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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Finance Docket No. 35305

**PETITION OF ARKANSAS ELECTRIC
COOPERATIVE FOR A DECLARATORY ORDER**

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**BNSF RAILWAY COMPANY'S REPLY TO
MOTION TO COMPEL DISCOVERY BY
ARKANSAS ELECTRIC COOPERATIVE CORPORATION**

BNSF Railway Company ("BNSF") hereby replies in opposition to the Motion to Compel Discovery served by Arkansas Electric Cooperative Corporation ("AECC") on February 11, 2010.

I. INTRODUCTION

The Board takes a measured and pragmatic approach to discovery. Under well established discovery standards, the Board applies a balanced approach that seeks to create an adequate factual basis to address the issues raised in the proceeding without unnecessarily complicating the discovery process or unnecessarily burdening producing parties. AECC's entire approach to discovery in this proceeding has been inappropriate and unrealistic. AECC inexcusably waited until six weeks after the Board had initiated this proceeding to serve any discovery requests. By then, other parties in this proceeding had served broad discovery, but AECC made no attempt to tailor its discovery requests to seek information that AECC considered necessary and that had not already been requested. Instead, AECC served a blunderbuss set of discovery that was extraordinarily broad and unfocused. And when BNSF explained in a February 10, 2010 letter to AECC that BNSF had produced documents on

virtually all issues raised by AECC notwithstanding BNSF's objections to AECC's unreasonable requests, AECC completely ignored BNSF's explanation and filed the present motion to compel.

There is no basis for requiring BNSF to undertake further discovery efforts. As explained in detail below, BNSF has produced data and documents on almost all of the issues that are the subject of AECC's motion to compel. It appears that AECC did not even bother to look at the BNSF documents that have been produced to AECC before filing its motion to compel.

The fact is that BNSF has undertaken very extensive efforts to produce discovery in this proceeding, and as a result of these efforts, BNSF has created a more than adequate factual basis for addressing the coal dust emissions standards that are at issue here. BNSF has produced nearly 30,000 documents encompassing more than 80,000 pages that came from the files of over 40 document custodians. The documents cover the full range of issues addressed in AECC's discovery requests with the exception of only four AECC discovery requests that are completely unrelated to coal dust. Those four requests, out of AECC's 149 requests, including subparts, relate to issues that have not been raised in this proceeding, and BNSF should not be required to undertake discovery efforts to locate responsive information.¹

II. BACKGROUND

The Board initiated this proceeding on December 1, 2009 to address the reasonableness of BNSF's coal dust emissions standards set forth in items 100 and 101 of BNSF's Coal Rules publication denominated as Price List 6041-B ("Rule Publication 6041-B"). *Petition of Arkansas Elec. Coop. Corp. for a Declaratory Order*, STB Finance Docket No. 35305, at 1 (STB served Dec. 1, 2009) ("*Decision*"). BNSF's coal dust emissions standards were originally set to

¹ For the Board's convenience, the specific discovery requests that AECC focuses on in its motion to compel are set out in Exhibit A. These requests are discussed in more detail below.

go into effect on November 1, 2009, but BNSF suspended the effective date of Items 100 and 101 of Rules Publication 6041-B until August 2010 to give the Board an opportunity to review and affirm the reasonableness of those standards. So that the Board would have sufficient time to address BNSF's standards, an expedited schedule for this proceeding was necessary.

In its petition for a declaratory order, AECC requested that discovery be permitted.

Petition of Arkansas Electric Cooperative Corporation for a Declaratory Order, STB Finance Docket No. 35305 at 6 & Annex 1 (filed Oct. 2, 2009) ("*AECC Petition*"). BNSF agreed that it would be appropriate to conduct discovery that would allow a full consideration of BNSF's efforts to address the coal dust problem. *BNSF Railway Company's Reply to Arkansas Electric Cooperative Corporation's Petition for a Declaratory Order*, STB Finance Docket No. 35305 at 10 (filed Oct. 21, 2009) ("*BNSF Reply to AECC Petition*"). In response, the Board noted that discovery is not generally conducted in declaratory order proceedings, but it accepted AECC's and BNSF's request for a 60-day discovery period (December 1 – January 31) because of the "factually intense nature of the dispute here." *Decision*, at 3-4.

Given the compressed discovery period and BNSF's recognition of the importance of compiling a comprehensive factual basis for addressing the issues raised in this proceeding, BNSF did not wait to receive specific discovery requests before collecting materials to be produced. BNSF pulled together thousands of documents – including documents that had been produced in discovery in a prior lawsuit that had focused on the causes of the 2005 Joint Line derailments, *Union Pacific R.R. Co. v. Entergy Arkansas, Inc., et al.*, No. CV2006-2711 (Pulaski Co., Ark. Cir. Ct.) ("*UP v. Entergy*"), and a large volume of additional materials from key employees in the engineering, maintenance, marketing, research and environmental areas who were involved in issues relating to coal dust. As explained in the verified statement of BNSF's

counsel Anthony LaRocca, attached to this reply as Exhibit B, altogether BNSF collected data and documents that came from more than 40 document custodians.

Two weeks after the Board initiated its proceeding, BNSF received the First Set of Discovery Requests from Western Coal Traffic League, Concerned Captive Coal Shippers, Entergy Gulf States, Louisiana, LLC, and Entergy Services, Inc., (collectively "WCTL"). WCTL shortly thereafter followed up with their Second Set of Discovery Requests. BNSF's responses to WCTL's discovery requests are attached at Exhibits C and D. While the WCTL requests were broad, for the most part they had been drafted with an eye toward creating an adequate factual basis for addressing the issues in this proceeding. They were also sufficiently timely to permit BNSF to collect information that BNSF had not anticipated would be the subject of discovery. BNSF also received a limited set of discovery requests from Ameren Energy Fuels and Services Company ("AFS"). AFS's requests were sufficiently narrow in focus that BNSF was able to make a timely response to those requests. BNSF's responses to AFS's discovery requests are attached as Exhibit E.

In contrast to WCTL's and AFS's discovery requests, AECC's discovery requests were voluminous, unfocused and unreasonably broad. While AECC first proposed that discovery be conducted in its October 2, 2009 petition, AECC waited until January 11, 2010, six weeks after the Board had initiated this proceeding and almost three quarters of the way through the discovery period, to serve any discovery. Including subparts, AECC's First Set of Discovery Requests included 149 interrogatories and document requests. While AECC acknowledges that the Board's discovery practices generally follow the discovery practices in the Federal Rules of Civil Procedure, AECC posed 83 interrogatories, including subparts, even though the Federal Rules allow a party to serve only 25. On January 29, 2010, the last business day before the close of

discovery, AECC served 37 additional interrogatories and document requests, including subparts. BNSF's responses to AECC's First Set of Discovery Requests are attached as Exhibit B to AECC's Motion to Compel.²

Moreover, AECC made no attempt to tailor its discovery requests to seek information it believed it needed beyond that which had already been requested by other parties. AECC's scattershot discovery requests, including the discovery requests that are the subject of AECC's motion to compel, largely overlapped with discovery requests BNSF had received from other parties. AECC made no effort to tailor its discovery requests to obtain additional information not already requested that AECC believed it might need. Moreover, BNSF produced to AECC all of the discovery materials produced in response to the requests of other parties (with the exception of a very small number of documents relating specifically to Ameren and some videos that BNSF offered to make available if AECC paid for the necessary hard drive, but AECC never responded). AECC never took the time to determine whether the information produced is responsive to the requests addressed in AECC's motion to compel.

Contrary to well-established practice in discovery disputes, AECC did not request a meet and confer discussion with BNSF to address discovery concerns AECC may have had before filing its motion to compel. AECC instead sent BNSF a letter on February 8, 2010 raising issues about BNSF's discovery responses to which BNSF responded on February 10, 2010, noting that BNSF has already produced to AECC nearly 30,000 documents totaling over 80,000 pages, including documents responsive to the majority of requests identified in AECC's letter. AECC's and BNSF's correspondence are attached to AECC's Motion to Compel as Exhibit C. BNSF explained why the discovery made available by BNSF is more than adequate to address the

² AECC's second set of discovery requests is not the subject of AECC's motion.

issues that are the focus of AECC's motion to compel, namely the 2005 Joint Line derailments (Interrogatories 22, 24 & 25 and Requests 4, 7-11, 20, 27-28, 30-31 & 57), information supporting the tariff (Interrogatories 3-4 and Request 24), information regarding the causal relationship between coal particles and ballast degradation (Request 21), communications between BNSF and Simpson Weather Associates (Request 35), and studies regarding coal dust emissions (Request 37).³ BNSF further explained that, while it objected to the form of many of AECC's requests, it had produced responsive information that it was able to locate in its extensive document collection efforts.

BNSF noted that four of AECC's requests regarding rules relating to the use of open top cars (Interrogatory 12), general operating rules relating to dust from commodities other than coal (Request 40), or standards for coal cars operating on the Joint Line (Requests 44-45) did not appear to be relevant to the issues in this proceeding. BNSF asked AECC to explain why it believed that BNSF should be required to undertake any document collection efforts relating to those requests, which appear to have only marginal relevance, if any, to the issues in this proceeding. BNSF stated that it was prepared to meet to discuss the issues, but AECC never followed up and instead filed the present motion to compel.

III. ARGUMENT

A. The Board's discovery standards call for a measured and pragmatic approach to discovery.

There are well-established limits on discovery that are critical to ensuring that STB proceedings are fair, expeditious and manageable. A fundamental principle is that a party is

³ AECC's motion is vague as to the scope of the relief requested. However, as a practical matter, the Board can only consider the specific discovery requests that are addressed in the motion. The specific requests discussed by AECC in the motion are set out at Exhibit A and are discussed in detail below.

required only to conduct a “reasonable search” for information responsive to discovery requests. *Entergy Arkansas, Inc. v. Union Pac. R.R. Co.*, STB Docket No. 42104, 2008 WL 2091414 at *4 (STB served May 19, 2008). Moreover, the discovery obligations in STB proceedings go both ways. While a party responding to discovery must undertake reasonable efforts to locate responsive materials, a party seeking discovery must pose reasonably focused requests and may not engage in fishing expeditions. “Discovery requests must be narrowly drawn, directed toward a relevant issue, and not used for a general fishing expedition.” *Duke Energy Corp. v. Norfolk S. Ry. Co.*, STB Docket No. 42070, 2002 WL 1730020 at *3 (STB served July 26, 2002) (denying document requests that were overly broad and burdensome where the producing party had already produced sufficient information).

The Board has repeatedly emphasized that the objective of discovery is to produce an adequate factual basis on which to address the issues in the proceeding, and that efforts unnecessary to achieve this objective will not be imposed. Thus, in a previous declaratory order proceeding, the Board denied a motion to compel “in light of the extensive documentation” that the railroad had already produced, noting that the moving party had “sufficient information to prepare its opening statement,” even though the railroad had not agreed to produce the specific type of document that the moving party requested. *Capitol Materials Inc. – Petition for Order – Certain Rates and Practices of Norfolk S. Ry. Co.*, STB Docket No. 42068, 2002 WL 599177 at *1-2 (STB served April 19, 2002). *See also Sierra Pac. Power Co. v. Union Pac. R.R. Co.*, STB Docket No. 42012, 1998 WL 25482 at *5 (STB served Jan. 26, 1998) (denying a request for production when the railroad had already produced responsive documents); *Canadian Pac. Ry. Co. – Control Dakota, Minnesota & E. R.R. Corp.*, STB Finance Docket 35081, 2008 WL 820744 at *3 (STB served March 27, 2008) (finding that no further production was necessary

because information already produced and representations in the reply were sufficient to satisfy the needs of the moving party).

The mere fact that information sought in discovery may be relevant to issues in the proceeding does not justify discovery that is overly broad or that imposes undue burdens. The Board repeatedly has made clear that the value of the information sought must be balanced with the burdens of collecting it. “[D]iscovery may be denied if it would be unduly burdensome in relation to the likely value of the information sought.” *Canadian Pac. Ry. Co.*, STB Finance Docket 35081, 2008 WL 820744 at *1 (STB served March 27, 2008). Discovery is often denied when the burden of producing information outweighs its asserted relevance. *See Otter Tail Power Co. v. Burlington N. and Santa Fe Ry. Co.*, STB Docket No. 42071, 2002 WL 31529065 at *3 (STB served Nov. 15, 2002) (denying motion to compel when complying with the discovery request would require an additional search through thousands of computer files).

The Board has also stated repeatedly that a party is not obligated to conduct special studies or to create information sought in discovery that was not kept in the ordinary course of business. *See, e.g., Entergy Arkansas, Inc. v. Union Pac. R.R. Co.*, STB Docket No. 42104, 2008 WL 2091414 at *5 (STB served May 19, 2008). *See also Sierra Pac. Power Co. v. Union Pac. R.R. Co.*, STB Docket No. 42012, 1998 WL 177704 at *4 (STB served April 16, 1998) (“[P]arties in litigation are not required to conduct burdensome special studies to produce information in the form requested by complainants.”).

Finally, the Board has recognized that “motions to compel can slow down the process and can be used to delay the resolution of cases.” *Procedures to Expedite Resolution of Rail Rate Challenges to Be Considered Under the Stand-Alone Cost Methodology*, STB Ex Parte No. 638, 2002 WL 2015425 at *3 (STB served Sept. 4, 2002). The Board denies motions to compel

when granting the motion would “unnecessarily disrupt the efficient processing” of the case.

Duke Energy Corp. v. Norfolk Southern Ry. Co., STB Docket No. 42070, 2002 WL 1730020 at *3 (STB served July 26, 2002).

Measured by these standards, AECC’s pursuit of discovery in this proceeding, including its motion to compel, has been inappropriate and unrealistic. AECC did not serve its initial discovery requests until January 11, 2010, almost three quarters of the way through the Board-prescribed two month discovery period. By that time, other parties had already directed broad discovery requests to BNSF, and AECC could have tailored its requests in an effort to obtain any additional information that it believed it would need beyond that already sought. Instead of serving tailored discovery requests, however, AECC pursued a blunderbuss approach, requesting discovery that was duplicative of but also far broader than that sought by other parties.

AECC’s motion to compel is similarly broadly overreaching and disproportionate to any legitimate discovery needs. Instead of assimilating the information set forth in BNSF’s February 10, 2010 letter and reviewing the document production that BNSF had already made, AECC filed a blunderbuss motion to compel that seeks production of materials already in its possession.

B. BNSF has expended substantial efforts to produce discovery in this proceeding that is more than adequate to address the issues raised.

Attached to this reply as Exhibit B is a verified statement of BNSF’s outside counsel Anthony LaRocca that describes the extensive efforts that BNSF has undertaken to ensure that there is a comprehensive factual basis for addressing the issues raised in this proceeding. As explained in the statement, BNSF began collecting materials relating to the 2005 derailments and to BNSF’s subsequent efforts to address the coal dust problem as soon as the Board initiated this proceeding. Given the compressed period available to conduct discovery, and the desire to

remain within the schedule established by the Board, BNSF did not wait to receive specific discovery requests.

A valuable source of relevant information was a document collection that BNSF had prepared for purposes of a prior state court litigation in *UP v. Entergy* which focused on the causes of the 2005 Joint Line derailments. As Mr. LaRocca explains, BNSF spent extensive efforts over six months in that case identifying relevant materials and working with the parties requesting discovery to ensure that a full set of documents and data was available on the 2005 derailments and role of coal dust in those derailments. In addition, BNSF collected materials from key BNSF employees in the engineering, maintenance, marketing, research and environmental areas. When BNSF received discovery requests from WCTL, it was clear that most of the requested discovery was covered by materials that were already being collected in anticipation of discovery. In a few areas, BNSF needed to supplement its document collection efforts to address requests that had not been anticipated, and it did so. In addition, in response to the WCTL discovery requests, BNSF collected thousands of documents and extensive data from BNSF's two primary coal dust consultants, SWA and CRA. By the end of this extensive document collection effort, BNSF had collected materials from over 40 document custodians, and BNSF's outside counsel had spent several hundred hours compiling and producing responsive materials. BNSF produced nearly 30,000 documents including more than 80,000 pages, which is virtually unprecedented in declaratory order proceedings. BNSF produced this set of materials to counsel for shippers that requested the discovery, including AECC.⁴

⁴ BNSF produced the entire set of materials to AECC except for a handful of documents containing highly confidential information that were produced to AFS and a hard drive containing videos that BNSF offered to make available to AECC if AECC paid for the hard drive, but AECC never responded.

BNSF's documents cover the full range of issues that might legitimately be addressed by the parties in this proceeding. BNSF has produced an extensive set of materials relating to the 2005 derailments and BNSF's efforts to understand the nature and magnitude of the coal dust problem. The BNSF documents contain information on test results, studies and analyses on various aspects of coal dust and a full set of materials on the development of the coal dust emissions standards that are the subject of this proceeding. BNSF's document production contains numerous documents relating to maintenance issues attributable to coal dust and the extraordinary maintenance efforts that have been undertaken to deal with coal dust. BNSF has produced discovery materials that are comprehensive and more than adequate for addressing the issues in this proceeding.

C. AECC has no basis for complaining about the scope of BNSF's document production relating to the 2005 derailments.

Most of the discovery requests that are the subject of AECC's motion to compel relate to BNSF's responses to discovery requests that seek information on the causes of the 2005 derailments. The specific derailment-related requests at issue here are set out in Exhibit A and are discussed below. Notwithstanding BNSF's legitimate objections to these overly broad, burdensome and duplicative requests, BNSF has produced thousands of documents relating to the 2005 derailments, including documents covering most of the specific requests that are the subject of AECC's motion. It appears that AECC did not even bother to review BNSF's documents on the 2005 derailments before filing its motion to dismiss because if AECC had done so, it would have known that it already had the vast majority of the information on the derailments that it was seeking.

Nor does AECC appear to have considered BNSF's explanation in its February 10, 2010 letter to AECC's counsel that BNSF had produced all documents relating to the causes of the

2005 derailments from the documents that BNSF produced in the *UP v. Entergy* case, where the focus of litigation was the causes of the derailments. AECC should know that these documents would be more than adequate to address issues relating to the derailments because AECC was an intervenor in that case.

To the extent that AECC's current discovery on the issue of the 2005 derailments seeks information that was not previously sought or produced, such information is unlikely to exist or, if it exists, its marginal incremental relevance is outweighed by the enormous efforts that would be necessary to locate it. For example, information on the position of specific cars in the derailed trains (Interrogatory No. 22) seems highly unlikely to be relevant in this proceeding relating to BNSF's coal dust standards. To the extent that information was the subject of discovery in the *UP v. Entergy* case to address the causes of the derailment, it would be included in BNSF's current document production. To the extent such information is not in the materials that BNSF has produced, it would be unreasonable to expect BNSF to expend efforts to locate it now, five years after the derailments.

As detailed below, BNSF has already produced extensive information relating to the 2005 derailments, and AECC's motion to compel further responses from BNSF on particular discovery requests relating to this issue should be denied. Each derailment-related discovery request discussed by AECC in its motion to compel is addressed below.

- Interrogatory No. 22 (information related to the number and positions of cars and locomotives in the trains during the derailments) – As explained above, the information sought is of only marginal relevance, if any, in this proceeding. In any event, BNSF has produced a large volume of information about the derailments. To the extent the number and positions of cars and locomotives in the derailed trains was addressed by the numerous persons investigating the causes of the derailments at the time, those materials would be included in the documents BNSF has already produced here. To the extent such information is not contained in BNSF's production, locating such information about trains that ran on BNSF's system nearly five years ago

would require a special study of archived train movement data that would not be justified or required under the Board's discovery rules.

- Interrogatory Nos. 24 and 25 (information related to the track and operating conditions at the time of the derailments) – Relevant track and operating conditions at the time of the derailments were documented by both BNSF and the FRA in their respective investigations of the Joint Line derailments, and such information has already been produced to AECC. To the extent these interrogatories seek information about track and operating conditions that were not specifically documented or observed by BNSF or the FRA at the time, such information would not be reasonably available now.
- RFP No. 4 (information retrieved from locomotive event recorders and communications involving crew members involved in the derailments) – BNSF did not previously collect or produce raw locomotive event recorder information in the *UP v. Entergy* litigation. (One of the two trains was powered by UP locomotives.) Such information was not considered to be sufficiently important then to require discovery, and it is of even less significance now. Requiring BNSF to track down raw locomotive event recorder data that is nearly five years old is totally unwarranted in this proceeding. As to communications involving crew members involved in the derailments, BNSF searched for responsive communications between train crew members and BNSF dispatchers in the *UP v. Entergy* litigation and determined that BNSF did not have any such communications. It is BNSF's understanding that UP had a copy of a transcript of such a communication that was used in depositions in the *UP v. Entergy* case.
- RFP No. 7 (photographs and video recordings of the locations of the Joint Line derailments during the 7-day period prior to and including the days of the derailments) – To the extent such information existed, BNSF collected such information in response to the subpoenas in the *UP v. Entergy* case, and BNSF has produced the same information in this proceeding.
- RFP Nos. 8-11 and 27-28 (documents relating to engineering specifications for the track and drainage system at the locations of the derailments) – In response to discovery requests in *UP v. Entergy*, BNSF searched the files of relevant document custodians who maintained the Joint Line and who investigated the derailments in 2005, and BNSF produced all documents responsive to the requests that could be located in its review. While BNSF advised AECC in BNSF's February 10 letter that AECC was receiving a large amount of information relating to the derailments, AECC did not even review BNSF's document production in this case to determine whether the extensive materials that have been produced provide AECC with sufficient information on the issues covered by these requests. To the extent the precise information sought in these requests was not located in the files reviewed in response to discovery requests in *UP v. Entergy*, it would be unduly burdensome for

BNSF to now attempt to locate additional files where such information might possibly be located.

- RFP No. 20 (irregular operating conditions at the locations of the derailments during the 30-day preceding the derailments) – As noted above, BNSF searched the files of relevant document custodians who maintained the Joint Line and who investigated the derailments in 2005 in response to the UP and Entergy subpoenas in *UP v. Entergy*, and BNSF produced all documents relating to these issues that could be located in its review, as BNSF indicated in its February 10 letter to AECC. To the extent the specific information sought in these AECC requests was not contained in the files reviewed, it would be unduly burdensome for BNSF to now attempt to locate additional files where such information might possibly reside.
- RFP No. 30 (ballast cleaning at the location of the derailments from January 1, 1995 to the present) – Notwithstanding BNSF's objection to the broad scope of this request, in response to the discovery requests served by WCTL in this proceeding, BNSF has already produced all BNSF Authorities for Expenditure ("AFE's") identifying ballast-related work performed on the Joint Line during the requested time period. BNSF has also produced documents prepared by BNSF in the ordinary course of business related to ballast cleaning on the Joint Line to the extent such documents could be located with a reasonable effort.
- RFP No. 31 (all reports, studies, analyses and documents related to the Joint Line derailments) – While this request is overly broad, as discussed above, BNSF has already produced all responsive documents collected and produced by BNSF in the *UP v. Entergy* litigation.
- RFP No. 57 (track inspection reports and track geometry car data created during the two-year period prior to the Joint Line derailments) – BNSF previously collected and produced all track geometry car data for the requested time in the *UP v. Entergy* litigation and has produced such information again here. BNSF also previously collected all reasonably available track inspection reports and has produced those reports here.
- Interrogatory No. 5 (information relating to BNSF inspections, maintenance and engineering of the Joint Line) – BNSF objected to this Request on multiple grounds and agreed to produce materials that are sufficient to show BNSF's current inspection and maintenance standards. AECC complains that BNSF agreed only to produce materials on its current standards. But, as discussed previously, BNSF produced materials that had been gathered in the *UP v. Entergy* litigation that contain extensive information about prior inspection and maintenance standards.

D. AECC's complaints about BNSF's responses to requests relating to "other important issues" are also unfounded.

AECC also argues that BNSF has not complied with its discovery requests relating to "other important issues in the case." AECC Motion, at 5. As to most of the discovery requests that AECC cites, BNSF has produced substantial responsive information and there is no valid basis for requiring that BNSF conduct additional discovery searches in these areas. The specific discovery requests at issue are discussed below.

- Interrogatory Nos. 3 and 4 and RFP No. 24 (facts and documents that relate to the "requirement . . . that shippers be held responsible to ensure that trains" do not emit more than the specified Integrated Dust Values) – BNSF objected to AECC's Interrogatories 3 and 4 and Request Number 24 because it appeared that AECC was asking BNSF to preview its opening evidence in the guise of a discovery request. However, in its motion to compel, AECC described these requests more broadly to be seeking "studies and facts supporting the tariff requirements" (AECC Motion, at 5.) *With this clarification as to the scope of AECC's requests*, BNSF can state that it has produced a vast number of responsive documents, including documents about the field testing of coal dust emitted from trains, materials relating to the development of the coal dust emissions standards, their rationale and supporting data, and other documents supporting the validity of the limits BNSF has set on the emission of coal dust.
- RFP No. 21 (documents that "substantiate the existence of causal relationships between the presence of specific quantities of coal particles of specific sizes in or on track ballast on the one hand, and specific degradations of ballast performance on the other hand") – BNSF objected to Request 21 because it appeared to require BNSF to undertake a special study. To the extent that Request 21 merely seeks existing data and documents relating to the impact of coal dust on ballast integrity, once again BNSF has produced a large amount of information. The importance of addressing the coal dust problem stems from the pernicious effect of coal dust on rail ballast, and there are numerous documents addressing this issue in the materials that BNSF has produced in discovery.
- RFP No. 35 ("[a]ll communications between BNSF and Simpson Weather Associates Inc. from January 1, 2000 to the present") – BNSF objected to the broad and unlimited request for all communications with SWA, a consulting firm with whom BNSF has worked for five years. Notwithstanding its objection, BNSF collected documents from the employees who worked directly with SWA and produced relevant communications with SWA from

the files of those employees. BNSF also produced thousands of documents generated by SWA relating to its consulting work for BNSF.

- RFP No. 37 (documents about “future or current studies of fugitive coal dust emissions from railcars”) – BNSF objected to this request to the extent it asked BNSF to produce documents concerning future studies that have not yet occurred. To the extent AECC’s request seeks production of documents regarding studies of coal dust emissions that have been initiated, BNSF has produced such documents in this proceeding. For example, BNSF is currently engaged in a large scale trial of coal dust remediation alternatives and BNSF has produced information relating to that trial.

As to the four remaining requests cited by AECC in its motion – Interrogatory No. 12 and Document Request Nos. 40, 44 and 45 – BNSF objected to conducting discovery on grounds that the requests seek information that is not relevant to the issues in this proceeding. These four requests are completely unrelated to coal dust. The requests at issue concern “BNSF rules regarding use of open-top cars,” “previous BNSF tariffs related to dust from other commodities,” “standards applied by BNSF to coal cars operating on the subject lines,” and “communications between BNSF and any agency or organization regarding changing standards for coal cars operating on such lines.” AECC Motion, at 5 (generally describing AECC Interrogatory 12 and AECC Requests 40, 44-45).⁵

In its February 10, 2010 letter to AECC, BNSF asked AECC to explain the relevance of these four requests. AECC chose to ignore BNSF’s request and instead filed its motion to

⁵ In its discovery requests, AECC asked BNSF to identify “all rules, requirements and/or standards relating to the use of open-top hoppers or gondolas, imposed by BNSF moving coal over the Joint Line and/or the Black Hills Subdivision, which were in effect on or subsequent to January 1, 2000.” AECC Interrogatory 12. AECC asked BNSF to produce “[a]ll documents relating to previous tariff provisions implemented by BNSF regarding dust from railcars carrying commodities other than coal.” AECC Request 40. AECC also asked BNSF to produce “[a]ll documents relating to requirements and/or standards BNSF has applied since January 1, 2000 for coal cars operating over the Joint Line and/or the Black Hills Subdivision, whether such standards were developed by BNSF, AAR or any other organization or agency.” AECC Request 44. AECC finally asked BNSF to produce “[a]ll communications between BNSF and any organization or agency relating to changing the standards for coal cars operating over the Joint Line and/or the Black Hills Subdivision.” AECC Request 45.

compel. These four requests are the only area where BNSF has refused altogether to produce responsive information, and BNSF believes its refusal is justified by the marginal relevance, if any, of the materials sought in these requests. While BNSF therefore urges the Board to deny AECC's motion to compel as it relates to these requests, if the Board believes that it would be important for the discovery record to include information relating to these topics BNSF would be willing to work with AECC to narrow the requests so as to encompass a manageable set of materials.

E. BNSF's general objections are appropriate and they have not been used as the basis for withholding responsive documents.

In its February 8, 2010 correspondence, AECC inquired about the meaning of BNSF's General Objection Nos. 2 and 9 as they relate to documents involving the Union Pacific Railroad Company. These objections state:

General Objection No. 2: BNSF objects to AECC's First Set of Discovery Requests to the extent they seek documents that contain confidential and proprietary information relating to third parties, including information that, if produced, could result in the violation of any contractual obligation to third parties or could violate 49 U.S.C. § 11904.

General Objection No. 9: BNSF objects to the definitions of "document" and "relating to," "relates to," "referring to," or "refers to" on grounds that they are overly broad, unduly burdensome, and beyond the scope of permissible discovery to the extent they require BNSF to search files where there is not a reasonable likelihood of finding responsive documents or include materials that are not in BNSF's possession, custody, or control, including information about or documents from Union Pacific Railroad Company ("UP").

BNSF explained in its February 10 letter response that it was not withholding any documents relating to UP on the basis of a confidentiality or non-disclosure agreement (Objection 2) and that it was not withholding any documents related to UP that are in its possession, custody or control on the basis of Objection 9. BNSF's Objection 9 objected to

requests for production of UP data or documents that are *not* in BNSF's possession, custody or control. AECC's motion completely disregards BNSF's explanation.

In its motion to compel, AECC raises an additional concern about BNSF's General Objection No. 7, which states:

General Objection No. 7: BNSF objects to AECC's First Set of Discovery Requests to the extent they seek information or documents created before January 1, 2005 on grounds that such requests are overly broad, unduly burdensome, and seek information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence.

AECC did not previously address General Objection No. 7 in its correspondence with BNSF, thus BNSF had no opportunity to respond to this concern. In any event, AECC's concerns are unfounded. While BNSF generally objected to producing documents prior to January 1, 2005 for the various reasons stated in the objection, it has, without waiver of its general objection, produced documents dated before 2005 in response to a number of AECC's requests. In particular, BNSF produced substantial information generated prior to 2005 from its prior production in the *UP v. Entergy* litigation that is responsive to many of AECC's requests. BNSF also collected a substantial amount of additional data and documents prior to 2005 in response to discovery requests of other parties in this proceeding (e.g., information related to ballast AFEs, as discussed in response to RFP No. 30 above).

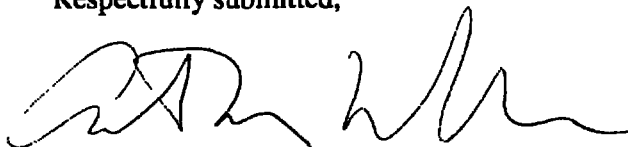
Finally, AECC objects to the language used in certain BNSF responses stating that BNSF "will conduct a search [for responsive documents] that is commensurate with the nature and expedited schedule of this proceeding." But as discussed above, it is well established that a party has only an obligation to undertake reasonable efforts to respond to discovery requests, and BNSF was merely stating that it would comply with this reasonableness standard in responding to the requests of parties in this proceeding. If AECC had taken the time to confer with BNSF

before filing its motion to compel or to review the extensive discovery record that BNSF created, it would have seen that notwithstanding the compressed discovery period in this proceeding, an extensive and comprehensive set of discovery materials has been produced. BNSF's discovery efforts were more than reasonable under the circumstances.

IV. CONCLUSION

Instead of reviewing the extensive materials that BNSF has produced in this proceeding to determine whether there was any specific information not included in the extensive discovery record that AECC needs to address BNSF's coal dust emissions standards, AECC chose to file a motion to compel that is as broad and unfocused as its discovery requests at a time when discovery should be winding down and the parties should be turning their attention to opening evidence. AECC had no legitimate basis for filing this motion. BNSF has produced substantial information on the issues that are the subject of this proceeding. The Board should deny AECC's motion.

Respectfully submitted,



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February 19, 2010

CERTIFICATE OF SERVICE

I hereby certify that on February 19, 2010, I caused a copy of foregoing to be served

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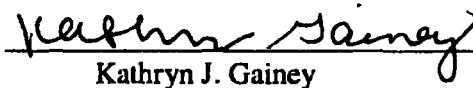

Kathryn J. Gainey

EXHIBIT A

Discovery Requests at Issue in AECC's Motion to Compel Discovery

I. Derailment related requests as to which BNSF has produced responsive materials.

Interrogatory No. 5

With respect to BNSF's inspection requirements, maintenance standards and engineering standards, please describe:

(a) BNSF inspection requirements and maintenance standards applicable to the Joint Line Derailment Locations at the time of the Joint Line Derailments. Describe whether those requirements and standards have changed subsequent to the Derailments, and, if so, describe the current requirements and standards;

(b) BNSF inspection and maintenance standards and practices applicable to concrete crossties. Indicate whether those standards and practices have changed subsequent to the Joint Line Derailments, and, if so, describe the current standards and practices;

(c) for the period from January 1, 1995 through May 15, 2005, all dates when each of the following maintenance activities were performed on the Joint Line Derailment Locations: (i) undercutting and ballast cleaning; (ii) ballast replacement; (iii) programmed replacement of crossties; (iv) replacement of rail; and (v) clearing of ditches, culverts and other drainage infrastructure;

(d) for the period from January 1, 1995 through May 15, 2005, the type(s) of infrastructure inspections performed on the Joint Line Derailment Locations, and the frequency with which each type of inspection was performed. For track inspections report separately inspections performed on foot, in hi-rail vehicles, by track geometry cars, and through other means;

(e) for the period from May 16, 2005 through December 31, 2009, the type(s) of infrastructure inspections performed on the Joint Line Derailment Locations, and the frequency with which each type of inspection was performed. For track inspections report separately inspections performed on foot, in hi-rail vehicles, by track geometry cars, and through other means; and

(f) if any of the inspections referenced in your answer to part (d) of this Interrogatory were performed using track geometry cars: (i) describe the specific tests performed by the track geometry cars in the last test prior to or on May 13, 2005; (ii) identify the training materials provided to track inspectors as of May 13, 2005 regarding the content and proper interpretation of reports and data from track geometry cars; and (iii) indicate whether any of the responses called for in parts (i) and (ii) would be different if the referenced date were May 13, 2009, and, if so, describe the responses as of May 13, 2009;

(g) BNSF engineering standards applicable at the time of the Joint Line Derailments to rail lines with the same traffic volume and composition as the lines at the Joint Line

Derailement Locations. Describe whether those standards have changed subsequent to the Derailements, and, if so, describe the current standards.

Interrogatory No. 22

For each Joint Line Derailement:

- (a) describe the number of cars in the train, the number and model designation of locomotives, the position of each locomotive in the train and the positions of all equipment that derailed;
- (b) describe the distance(s) from mileposts or specific points identifiable on the current Joint Line track chart associated with the point of initial derailement, any track over which equipment was dragged and the track on which the train came to rest;
- (c) confirm that the derailement occurred on the easternmost track, or specify the track on which the derailement occurred; and
- (d) describe the number of main line tracks at the milepost on the Joint Line where the initial derailement occurred and the date each such track was placed in service.

Interrogatory Number 24

With regard to the Joint Line Derailement Locations, please describe all facts, and identify all studies, analyses, reports and documents relating to:

- (a) the location and thickness in the roadbed of scoria;
- (b) deviations between "as-built" conditions and final preconstruction engineering plans and specifications for each track;
- (c) deviations between "as-built" conditions and final preconstruction engineering plans and specifications for the drainage system (including but not limited to track ditches, intercepting ditches and culverts) for each track;
- (d) slow orders in effect during the 30-day period preceding and including the Joint Line Derailements; and
- (e) "trouble tickets" or other reports of irregular operating conditions during the 30-day period preceding and including the Joint Line Derailements.

Interrogatory Number 25

Identify all documents regarding:

- (a) the thickness under ties of and material(s) constituting the ballast between the initial point of each derailement and a point 0.25 rail miles north of the initial point of each derailement at the time of the given derailement;

(b) the thickness of and material(s) constituting the sub-ballast between the initial point of each derailment and a point 0.25 rail miles north of the initial point of each derailment at the time of the given derailment;

(c) the material(s) constituting the subgrade between the initial point of each derailment and a point 0.25 rail miles north of the initial point of each derailment at the time of the given derailment; and

(d) the thickness and condition of any scoria that previously was used in the construction or maintenance of the line, between the initial point of each derailment and a point 0.25 rail miles north of the initial point of each derailment at the time of the given derailment.

Request for Production Number 4

All information retrieved from locomotive event recorders and audio or other recordings (including transcripts of such recordings or other written records) of communications involving train and engine crew members between the time each train involved in the Joint Line Derailments departed the mine and the time debriefing of the crew regarding each derailment was completed.

Request for Production Number 7

All reports, photographs and video recordings relating to Joint Line infrastructure, operating conditions and ambient circumstances at the Joint Line Derailment Locations during the 7-day period prior to and including the Joint Line Derailments.

Request for Production Number 8

For the Joint Line Derailment Locations, as-built engineering drawings and specifications for each track.

Request for Production Number 9

For the Joint Line Derailment Locations, all documents relating to (a) deviations between "as-built" conditions and final preconstruction engineering plans and specifications for each track; and (b) the location and thickness in the roadbed of scoria.

Request for Production Number 10

For the Joint Line Derailment Locations, all documents relating to (a) "as-built" engineering drawings and specifications for the drainage system (including but not limited to track ditches, intercepting ditches and culverts) for each track; and (b) engineering drawings and specifications for the current drainage system for each track.

Request for Production Number 11

All documents relating to changes made from the time of the Joint Line Derailments to the present in the thickness of and materials constituting the ballast and sub-ballast layers, and in any other engineering specifications relating to the Joint Line Derailment Locations.

Request for Production Number 20

All documents relating to "trouble tickets" or other reports of irregular operating conditions for the Joint Line Derailment Locations during the 30-day period preceding and including the Joint Line Derailments.

Request for Production Number 27

All engineering records, drawings and documents depicting or identifying the Joint Line Derailment Locations from January 1, 2000 to the present.

Request for Production Number 28

All engineering records, drawings and documents depicting or identifying the drainage system (including but not limited to track ditches, intercepting ditches and culverts) for the Joint Line Derailment Locations from January 1, 2000 to the present.

Request for Production Number 30

With regard to the Joint Line Derailment Locations, all documents relating to the schedule of ballast cleaning from January 1, 1995 to the present.

Request for Production Number 31

All reports, studies, analyses and documents relating to the Joint Line Derailments.

Request for Production Number 57

All documents relating to documentation of the presence of fugitive coal dust on the Joint Line and/or the Black Hills Subdivision by BNSF, the STB or any other organization or agency.

II. Requests for documents on "other important issues" as to which BNSF has produced responsive materials.

Interrogatory Number 3

Please describe all facts, and identify all studies, analyses, reports, and documents on which you rely to support the requirement in the Joint Line Tariff that shippers be held responsible to ensure that trains moving over the Joint Line not emit more than an Integrated Dust Value (IDV.2) of 300 units.

Interrogatory Number 4

Please describe all facts, and identify all studies, analyses, reports, and documents on which you rely to support the requirement in the Black Hills Subdivision Tariff that shippers be held responsible to ensure that trains moving over the Black Hills Subdivision not emit more than an Integrated Dust Value (IDV.2) of 245 units.

Request for Production Number 21

Please describe all facts, and identify all studies, analyses, reports and documents relating to the BNSF Load Profile including but not limited to any discussions, decisions and/or evaluations of the potential modification of the BNSF Load Profile in the future.

Request for Production Number 24

With regard to the Joint Line Derailment Locations, please describe all facts, and identify all studies, analyses, reports and documents relating to:

- (a) the location and thickness in the roadbed of scoria;
- (b) deviations between "as-built" conditions and final preconstruction engineering plans and specifications for each track;
- (c) deviations between "as-built" conditions and final preconstruction engineering plans and specifications for the drainage system (including but not limited to track ditches, intercepting ditches and culverts) for each track;
- (d) slow orders in effect during the 30-day period preceding and including the Joint Line Derailments; and
- (e) "trouble tickets" or other reports of irregular operating conditions during the 30-day period preceding and including the Joint Line Derailments.

Request for Production Number 35

All communications between BNSF and Simpson Weather Associates Inc. from January 1, 2000 to the present.

Request for Production Number 37

All documents relating to future or current studies regarding fugitive coal dust emissions from railcars.

III. Four requests on "other important issues" as to which BNSF has not produced responsive materials.

Interrogatory Number 12

Identify all rules, requirements and/or standards relating to the use of open-top hoppers or gondolas, imposed by BNSF on railcars moving coal over the Joint Line and/or the Black Hills Subdivision, which were in effect on or subsequent to January 1, 2000. Identify all documents related to such rules, requirements and/or standards.

Request for Production Number 40

All documents relating to previous tariff provisions implemented by BNSF regarding dust from railcars carrying commodities other than coal.

Request for Production Number 44

All documents relating to requirements and/or standards BNSF has applied since January 1, 2000 for coal cars operating over the Joint Line and/or the Black Hills Subdivision, whether such standards were developed by BNSF, AAR or any other organization or agency.

Request for Production Number 45

All communications between BNSF and any organization or agency relating to changing the standards for coal cars operating over the Joint Line and/or the Black Hills Subdivision.

EXHIBIT B

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Finance Docket No. 35305

**PETITION OF ARKANSAS ELECTRIC COOPERATIVE
FOR A DECLARATORY ORDER**

**VERIFIED STATEMENT OF ANTHONY J. LARocca IN SUPPORT OF
BNSF RAILWAY COMPANY'S REPLY TO MOTION TO COMPEL DISCOVERY BY
ARKANSAS ELECTRIC COOPERATIVE CORPORATION**

I am Anthony J. LaRocca, a partner at the law firm of Steptoe & Johnson LLP, and outside counsel to BNSF Railway Company ("BNSF") in the above-captioned proceeding. I am submitting this Verified Statement to describe for the Board the extensive discovery efforts undertaken by BNSF in this case. As explained below, BNSF has produced nearly 30,000 documents and more than 80,000 pages from the files of over 40 document custodians. BNSF's document production provides a more than adequate basis for addressing the issues raised in this proceeding.

1. The Board initiated this proceeding on December 1, 2009 to address the reasonableness of BNSF's coal dust emissions standards set forth in items 100 and 101 of BNSF's Coal Rules publication denominated as Price List 6041-B ("Rule Publication 6041-B"). *Petition of Arkansas Elec. Coop. Corp. for a Declaratory Order*, STB Finance Docket No. 35305 at 1 (STB served Dec. 1, 2009) ("*Decision*"). In its initiation order, the Board noted that discovery is not generally conducted in declaratory order proceedings, but prescribed a 60-day discovery period because of the "factually intense nature of the dispute here." *Decision*, at 3-4.

2. In light of the brief discovery period prescribed by the Board, BNSF's counsel did not wait to receive discovery requests, but instead undertook a series of interviews with BNSF

employees knowledgeable about coal dust issues in an effort to locate potentially relevant files. Counsel began collecting the paper and electronic files identified in these interviews so that BNSF could respond promptly to specific discovery requests when they were received. In addition, counsel located and began organizing thousands of documents that had been collected for discovery in a prior lawsuit that had focused on the causes of the 2005 Joint Line derailments – *Union Pacific R.R. Co. v. Entergy Arkansas, Inc., et al.*, No. CV2006-2711 (Pulaski Co., Ark. Cir. Ct.) (“*UP v. Entergy*”). In that case, BNSF worked closely with UP and Entergy to make sure that the scope of BNSF’s discovery would adequately cover the full range of issues relating to the 2005 derailments. Over approximately a six month period, BNSF interviewed potential document custodians and collected a large set of materials to be reviewed and produced.

3. On December 18, 2009, BNSF received the First Set of Discovery Requests from Western Coal Traffic League, Concerned Captive Coal Shippers, Entergy Gulf States, Louisiana, LLC, and Entergy Services, Inc., (collectively “WCTL”). Although the requests were broad, most of them involved issues that BNSF had anticipated to be the subject of discovery and BNSF was therefore able immediately to begin preparing the documents that had been collected for production. In some cases, the WCTL requests sought information that BNSF had not expected to be the subject of discovery, and BNSF undertook additional efforts to collect responsive materials. BNSF’s outside counsel spent several hundred hours collecting, reviewing and preparing the materials for production.

4. On December 30, 2009, WCTL followed up with their Second Set of Discovery Requests. WCTL’s Second Set of Discovery Requests focused on interrogatories directed to BNSF’s coal dust testing and measurement protocols, and BNSF provided substantive responses. BNSF also received on January 15, 2010 a set of discovery requests from Ameren Energy Fuels

and Services Company (“AFS”). AFS’s requests were narrow and sought information about the coal dust profile of Ameren’s trains that BNSF was able to produce without extensive additional effort.

5. By contrast, AECC’s first set of discovery requests, filed on January 11, 2010, were extremely broad, unfocused and voluminous. Including subparts, AECC’s First Set of Discovery Requests included 149 interrogatories and document requests. However, BNSF determined that most of the requests covered issues that were addressed by the materials that BNSF had collected in anticipation of discovery and in response to other requests made by WCTL. In some areas relating to the derailments, BNSF collected additional information responsive to particular AECC requests. On the last business day before the close of discovery, AECC served its Second Set of Discovery Requests, which added 37 interrogatories and document requests, including subparts. BNSF determined once again that AECC’s additional requests sought information in areas that were already covered by BNSF’s document production.

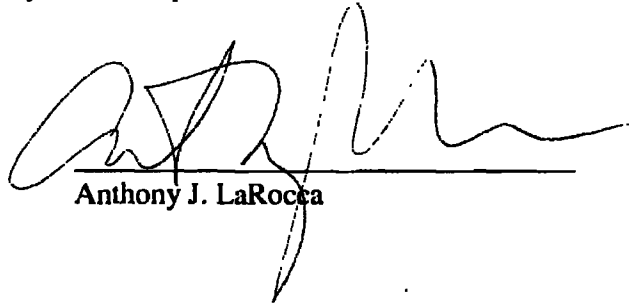
6. In total, BNSF has produced nearly 30,000 documents including more than 80,000 pages in response to discovery requests in this proceeding from WCTL, AECC, and AFS. The document set included documents from more than forty custodians. This entire set of materials was produced to AECC except for a handful of documents containing highly confidential information that were produced to AFS and a hard drive containing videos that BNSF offered to make available to AECC if AECC paid for the hard drive, but AECC never responded.

7. BNSF’s document production provides a more than adequate basis for addressing the range of issues raised in this proceeding. Among numerous other topics, BNSF’s documents contain comprehensive information on the 2005 derailments and the role of coal dust in the

derailments, BNSF's responses to the derailments, including the initiation of numerous studies on the extent of the coal dust problem, BNSF's extensive testing of coal dust emissions on trains operating in the Powder River Basin and the effects of various remediation alternatives, BNSF's maintenance practices and costs associated with coal dust, BNSF's numerous communications with shippers, mines and NCTA informing them in detail about BNSF's ongoing studies, BNSF's communications with its coal dust consultants on the measurement of coal dust emissions and the development of appropriate limits on coal dust emissions, and BNSF's development of the coal dust emission standards that are at issue in this proceeding. Although this list of subjects addressed in the produced materials is not exhaustive, it indicates the breadth of BNSF's document production and demonstrates that BNSF's discovery production provides a factual basis for addressing the issues that have been raised in this proceeding.

VERIFICATION

I, Anthony J. LaRocca, verify under penalty of perjury that the foregoing Verified Statement is true and correct. Further, I certify that I am qualified and authorized to file this statement.



Anthony J. LaRocca

Executed on February 19, 2010

EXHIBIT C

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Finance Docket No. 35305

**PETITION OF ARKANSAS ELECTRIC
COOPERATIVE FOR A DECLARATORY ORDER**

**BNSF RAILWAY COMPANY'S RESPONSES AND OBJECTIONS TO THE
FIRST SET OF INTERROGATORIES AND REQUESTS FOR PRODUCTION
OF DOCUMENTS OF WESTERN COAL TRAFFIC LEAGUE, CONCERNED
CAPTIVE COAL SHIPPERS, ENTERGY ARKANSAS, INC., ENTERGY GULF
STATES LOUISIANA, LLC, AND ENTERGY SERVICES, INC.**

BNSF Railway Company ("BNSF"), pursuant to 49 C.F.R. §§ 1114.26 and 1114.30, hereby responds and objects to the First Set of Interrogatories and Requests for Production of Documents served by Western Coal Traffic League, Concerned Captive Coal Shippers, Entergy Arkansas, Inc., Entergy Gulf States Louisiana, LLC, and Entergy Services, Inc. (collectively "WCTL") on December 18, 2009 ("WCTL's First Set of Discovery Requests").

**GENERAL OBJECTIONS AND
OBJECTIONS TO DEFINITIONS AND INSTRUCTIONS**

The following general objections and objections to definitions and instructions are made with respect to WCTL's First Set of Discovery Requests.

1. BNSF objects to WCTL's First Set of Discovery Requests to the extent they seek documents that contain confidential and proprietary information relating to

third parties, including information that, if produced, could result in the violation of any contractual obligation to third parties or could violate 49 U.S.C. § 11904.

2. BNSF objects to WCTL's First Set of Discovery Requests to the extent they seek disclosure of documents that are protected by the attorney-client privilege, work product doctrine, and/or any other appropriate privilege or doctrine. Any production of privileged or otherwise protected documents is inadvertent and shall not constitute a waiver of any claim of privilege or other protection.

3. BNSF objects to WCTL's First Set of Discovery Requests to the extent they seek production of "all documents" relating to subjects specified in particular requests on grounds that those requests are overly broad and unduly burdensome in light of the nature of this proceeding, including the highly compressed discovery period. BNSF will conduct a file search that is commensurate with the nature and expedited schedule of this proceeding.

4. BNSF objects to WCTL's First Set of Discovery Requests to the extent they seek production of information or documents in computer-readable format to the extent that production in such format would be an unduly burdensome and oppressive task.

5. BNSF objects to WCTL's First Set of Discovery Requests to the extent they request information relating to BNSF's internal management cost data on grounds that such requests seek highly sensitive information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. BNSF further objects to such requests on grounds that they are beyond the scope of permissible discovery.

6. BNSF objects to WCTL's First Set of Discovery Requests to the extent they request that BNSF continue to produce responsive materials that are created beyond the close of discovery as set out in the Surface Transportation Board's order served on December 1, 2009.

7. BNSF objects to WCTL's First Set of Discovery Requests to the extent they seek information or documents created before January 1, 2005 on grounds that such requests are overly broad, unduly burdensome, and seek information that is neither relevant nor reasonably calculated to the discovery of admissible evidence.

8. BNSF objects to the definition of "BNSF" on the basis that it is overly broad, unduly burdensome, and beyond the scope of permissible discovery to the extent it requires the production of documents that are not in the possession, custody, or control of BNSF, including, for example, documents in the possession of former employees, directors, consultants, and all other persons acting (or who have acted) on BNSF's behalf. BNSF further objects to the definition of "BNSF" to the extent it includes documents in the possession of "any contractors retained to perform services in connection with coal transportation services relating to the coal movements affected by this proceeding." Subject to this objection, BNSF will produce documents that are reasonably available from its two primary coal dust consulting firms, Simpson Weather Associates ("SWA") and Conestoga-Rovers & Associates ("CRA"), that relate to the principal consulting activities that those firms performed for BNSF.

9. BNSF objects to the definitions of "document(s)" and "related," "related to," and "relating to" on grounds that they are overly broad, unduly burdensome, and

beyond the scope of permissible discovery to the extent they require BNSF to search files where there is not a reasonable likelihood of finding responsive documents or include materials that are not in BNSF's possession, custody, or control, including information about or documents from Union Pacific Railroad Company ("UP").

10. BNSF objects to WCTL's First Set of Discovery Requests to the extent they seek information that is not maintained by BNSF in the normal course of business, that is not maintained by BNSF in the format requested, or that would require a special study to compile or to report in the format requested on grounds that such requests are overly broad, unduly burdensome, and beyond the permissible scope of discovery.

11. BNSF objects to Instruction Number 2 on grounds that it is overly broad, unduly burdensome and beyond the scope of permissible discovery to the extent it requires BNSF to provide detailed information or descriptions about data produced in computer readable-format. BNSF further objects to Instruction Number 2(a) on grounds that it is overly broad, unduly burdensome and beyond the scope of permissible discovery to the extent it seeks computer programs and intermediate files used in deriving responsive data.

12. BNSF objects to Instruction Number 3 on grounds that it is overly broad and unduly burdensome to the extent it seeks information that is not necessary to enable WCTL to assess the grounds for withholding of a document. BNSF further objects to Instruction Number 6 on grounds that it is overly broad, unduly burdensome, and beyond the scope of permissible discovery.

13. BNSF objects to Instruction Number 7 on grounds that it is overly broad and unduly burdensome to the extent it requires BNSF to identify each discovery request to which a document may be partially responsive.

14. BNSF incorporates these General Objections and Objections to Definitions and Instructions into each Response below as if fully set forth therein.

RESPONSES AND OBJECTIONS TO INTERROGATORIES

Interrogatory Number 1:

Identify all consultants, consulting firms, and/or engineering companies that have been retained by BNSF and/or BNSF and UP jointly, to perform or prepare any studies, analyses, investigations, reports, and any and all field work or field monitoring activities (whether on BNSF property, UP property, jointly owned property, mine property, etc.), relating to the release and/or accumulation of coal dust and its potential or actual impacts on rail operations, track maintenance, rail economics or environmental concerns.

BNSF Response: BNSF objects to this Interrogatory on the grounds that it is overly broad and seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence to the extent it requires BNSF to identify "all consultants, consulting firms, and/or engineering companies" retained by BNSF, regardless of the amount of work they performed or the relevance of that work to the issues in this proceeding. BNSF further objects to this Interrogatory to the extent it seeks information protected from disclosure by the attorney-client privilege or work-product doctrine. Subject to and without waiving its objections, BNSF states that it has worked primarily with the following two consulting firms on issues relating to the emission of coal dust: Simpson Weather Associates ("SWA") and Conestoga-Rovers & Associates ("CRA"). In addition, BNSF has retained the following firms to perform work on matters

relating to coal dust emissions: Cordilleran Environmental Consultants, General Electric Railcar Services Corporation (along with Operations Management International, Inc.), Six-Sigma Qualtec, Smarter Solutions, Inc., and Zeta-Tech Associates, Inc.

Interrogatory Number 2:

Please identify any penalties or consequences that BNSF has considered, discussed, or otherwise reviewed, relating to any trains operating on the Joint Line or Black Hills Sub-Division, including UP trains that are operated on the Joint Line, that fail to comply with Items 100 and 101 of BNSF's Price List 6041-B.

BNSF Response: BNSF objects to Interrogatory Number 2 to the extent it seeks information relating to compliance with Items 100 and 101 of BNSF's Price List 6041-B that is protected from disclosure by the attorney-client privilege, the work product doctrine, or any other privilege. Subject to and without waiving its specific and general objections, BNSF states that no formal non-privileged consideration has been given to specific penalties or consequences relating to trains that fail to comply with Items 100 and 101 of BNSF's Price List 6041-B, no decisions have been made regarding such penalties or consequences, and no actions have been taken to enforce compliance with Items 100 and 101 of BNSF's Price List 6041-B.

Interrogatory Number 3:

Identify any Federal or State agencies, departments or governmental authority that raised concerns relating to the release of coal dust from railcars and/or the accumulation of coal dust on the Joint Line. For each such agency please identify:

- a. The agency, department or governmental authority involved;
- b. The nature of the concerns raised;
- c. Any regulatory steps that may have been contemplated to minimize the release and/or accumulation of coal dust, including any proceedings or investigations that may have been instituted; and
- d. Any conclusions, recommendations, findings, reports, or other action ordered by the agency, department or governmental authority involved.

BNSF Response: Subject to and without waiving its general objections, BNSF will produce documents from which non-privileged information sought in Interrogatory No. 3 can be obtained to the extent such documents are reasonably available.

Interrogatory Number 4:

Explain the methodology used by BNSF and/or any consultants and/or engineering companies retained by BNSF and/or BNSF and UP jointly, to develop Items 100 and 101 of BNSF's Price List 6041-B. BNSF's answer should include, but should not be limited to:

- a. An explanation of the methodology used to develop the TSM system currently being utilized to measure dust and a list of all publications by BNSF or its consultants regarding the historic development, use, and evaluation of this system;
- b. An explanation of the methodology used to develop the requirement that cars loaded with coal from any mine origin moving over the Joint Line shall not release more than an IDV.2 of 300 units;
- c. An explanation of the methodology used to develop the requirement that cars loaded with coal from any mine origin moving over the Black Hills Sub-Division shall not release more than an IDV.2 of 245 units;
- d. An explanation of the methodology used to develop the locations for measuring coal dust released from railcars on the Joint Line and/or Black Hills Sub-Division;
- e. An explanation of the methodology used to develop the profiling requirement in Items 100 and 101; and
- f. A detailed explanation of how IDV, IDV.2, and/or any other "IDV" is calculated, starting with the E-Sampler raw data and ending with IDV/IDV.2, etc., with an explanation of all steps, calculations, and assumptions involved.

BNSF Response: Subject to and without waiving its general objections, BNSF will produce documents from which non-privileged information sought in Interrogatory No. 4 can be obtained to the extent such documents are reasonably available.

Interrogatory Number 5:

Please describe BNSF's standard practice with regard to the disposition of the coal dust that BNSF removes from ballast on the Joint Line during ballast cleaning and/or undercutting operations. In particular, please explain whether the coal dust that BNSF removes from the Joint Line during cleaning and/or undercutting: (i) is collected and

transported away from the Joint Line for consumption in utility and/or industrial operations; (ii) is collected and deposited in a designated location without subsequent consumption; or (iii) is left uncollected on or near BNSF's right of way.

BNSF Response: Subject to and without waiving its general objections, BNSF states that the vast majority of coal dust that is collected along the Joint Line during cleaning and/or undercutting activities is used as road base or for similar applications on the service roadways that are near or adjacent to the rail lines. In 2008 and again in late 2009, BNSF carried out special projects to remove coal dust at certain locations along the Joint Line. The coal dust that was collected from these special clean up projects was loaded into hundreds of rail cars and was shipped to a landfill in North Dakota.

Interrogatory Number 6:

To the extent that there have been any changes (since 2000) in BNSF's standard practice with regard to the disposition of the coal dust that BNSF removes from the Joint Line ballast, please identify those changes.

BNSF Response: See BNSF's Response to Interrogatory Number 5 above.

Interrogatory Number 7:

Please identify, by name, title and address, the person(s) who prepared each answer to these Interrogatories and who reviewed and selected the documents to be produced in response to each of the following Requests for Production of Documents.

BNSF Response: BNSF objects to this Interrogatory to the extent it requests the names of persons that reviewed and selected documents to be produced in response to particular document requests on grounds that such a request is beyond the scope of permissible discovery and seeks information that is protected from disclosure by the attorney-client privilege and the work product doctrine. Subject to and without waiving its specific and general objections, BNSF states that it will produce the names of persons

whose files were searched in response to these discovery requests. BNSF further states that William VanHook, AVP, Chief Engineer, Systems, Maintenance and Planning, was primarily responsible for preparing the answers to these Interrogatories.

RESPONSES AND OBJECTIONS TO DOCUMENT REQUESTS

Request for Production Number 1:

Produce all documents, including any studies, analyses, presentations, or reports prepared by or on behalf of BNSF, or BNSF and UP jointly, relating to:

- a. The cause(s) of coal dust accumulation on the Joint Line and/or BNSF's Black Hills Sub-Division;
- b. The volume, mass, and/or mass concentration of coal dust accumulation on the Joint Line and/or BNSF's Black Hills Sub-Division;
- c. *The potential adverse effects of such coal dust accumulation on the Joint Line and/or BNSF's Black Hills Sub-Division;*
- d. Any and all considered or suggested remedial action(s) to alleviate or eliminate the accumulation of coal dust and/or the effects of coal dust accumulation; and
- e. The identification and/or characterization of material removed from the Joint Line ballast during maintenance.

BNSF Response: BNSF objects to this Request to the extent it seeks "all documents" relating to the matters described in subsections (a) – (e) on grounds that the Request is overly broad and unduly burdensome in light of the nature of this proceeding, including the highly compressed discovery period. Subject to and without waiving its specific and general objections, BNSF will conduct a search for responsive, non-privileged materials that is commensurate with the nature and expedited schedule of this proceeding.

Request for Production Number 2:

Produce all documents, including any studies, analyses, reports, presentations, workpapers or other documents, that discuss, support or explain the methodology used to establish the IDV.2 standard at 300 units for the Joint Line and 245 units for the Black Hills Sub-Division.

BNSF Response: BNSF objects to this Request to the extent it seeks “all documents” relating to the methodology used to establish the IDV.2 standard on grounds that the Request is overly broad and unduly burdensome in light of the nature of this proceeding, including the highly compressed discovery period. Subject to and without waiving its specific and general objections, BNSF will conduct a search for responsive, non-privileged materials that is commensurate with the nature and expedited schedule of this proceeding.

Request for Production Number 3:

Produce all documents, including any studies, reports, and other analyses relating to the derailments on the Joint Line in May 2005 that are referenced at page 4 of BNSF's Reply, including but not limited to: any correspondence, communication, or other documents relating to discussions between BNSF and UP concerning the causes for the conditions that led to the referenced derailments and any reports relating to any investigations or inspections of the Joint Line conditions by the Federal Railroad Administration.

BNSF Response: BNSF objects to this Request to the extent it seeks “all documents” relating to the derailments on the Joint Line in May 2005 on grounds that the Request is overly broad and unduly burdensome in light of the nature of this proceeding, including the highly compressed discovery period. Subject to and without waiving its specific and general objections, BNSF will conduct a search for responsive, non-privileged materials that is commensurate with the nature and expedited schedule of this proceeding.

Request for Production Number 4:

Produce copies of all density charts and/or tables showing gross ton-miles by direction and line segment applicable to any portion of the time period beginning

January 1, 2005 through the present for the Joint Line and BNSF's Black Hills Sub-Division.

BNSF Response: BNSF objects to this Request to the extent it seeks "all density charts/and or tables showing gross ton-miles" for the Joint Line and BNSF's Black Hills Sub-Division on grounds that the Request is overly broad and unduly burdensome in light of the nature of this proceeding, including the highly compressed discovery period.

BNSF further objects to this Request to the extent it seeks information relating to UP trains operating on the Joint Line. Subject to and without waiving its specific and general objections, BNSF will produce non-privileged, responsive documents sufficient to show the gross ton-miles for BNSF's trains on the Joint Line and BNSF's Black Hills Sub-Division to the extent such information is reasonably available.

Request for Production Number 5:

Produce copies of all density charts and/or tables showing gross ton-miles of UP traffic by direction and line segment applicable to any portion of the time period beginning January 1, 2005 through the present for the Joint Line.

BNSF Response: BNSF objects to this Request to the extent it seeks "all density charts/and or tables showing gross UP traffic" for the Joint Line on grounds that the Request is overly broad and unduly burdensome in light of the nature of this proceeding, including the highly compressed discovery period. BNSF further objects to this Request on grounds that it seeks information relating to UP traffic.

Request for Production Number 6:

Produce copies of all track charts and track profiles for the Joint Line and BNSF's Black Hills Sub-Division for the time period beginning January 1, 2005 through the present.

BNSF Response: BNSF objects to this Request to the extent it seeks "all track charts and track profiles" for the Joint Line and BNSF's Black Hills Sub-Division during the requested time period on grounds that the Request is overly broad and unduly burdensome in light of the nature of this proceeding, including the highly compressed discovery period. Subject to and without waiving its specific and general objections, BNSF will produce non-privileged, responsive documents sufficient to show the track charts and/or track profiles of the Joint Line and BNSF's Black Hills Sub-Division during the requested time period to the extent such materials are reasonably available.

Request for Production Number 7:

Produce copies of all slow orders and other restrictions on train operations that BNSF issued at any time after January 1, 2000 for the Joint Line and BNSF's Black Hills Sub-Division.

BNSF Response: BNSF objects to this Request to the extent it seeks "all slow orders and other restrictions" for the Joint Line and BNSF's Black Hills Sub-Division on grounds that the Request is overly broad and unduly burdensome in light of the nature of this proceeding, including the highly compressed discovery period. BNSF further objects to this Request to the extent it seeks information on "other train restrictions" on grounds that the reference to "other train restrictions" is vague and undefined. BNSF further objects to this Request to the extent it seeks documents from years prior to January 1, 2005. Subject to and without waiving its specific and general objections, BNSF will produce non-privileged, responsive documents sufficient to show BNSF's slow orders over the relevant lines from 2001 to the present. BNSF does not have such information for the year 2000.

Request for Production Number 8:

Produce copies of all documents sufficient to show the duration of slow orders and other restrictions on train operations that BNSF issued at any time after January 1, 2000 for the Joint Line and BNSF's Black Hills Sub-Division.

BNSF Response: BNSF objects to this Request to the extent it seeks "all documents" relating to slow orders and other restrictions on train operations on the specified rail lines on grounds that the Request is overly broad and unduly burdensome in light of the nature of this proceeding, including the highly compressed discovery period. BNSF further objects to this Request to the extent it seeks information on "other train restrictions" on grounds that the reference to "other train restrictions" is vague and undefined. BNSF further objects to this Request to the extent it seeks documents from years prior to January 1, 2005. Subject to and without waiving its specific and general objections, BNSF will produce non-privileged, responsive documents sufficient to show the duration of BNSF's slow orders over the relevant lines from 2001 to the present. BNSF does not have such information for the year 2000.

Request for Production Number 9:

Produce copies of documents sufficient to show the number of trains moving per day over the Joint Line and BNSF's Black Hills Sub-Division on a daily basis for the time period January 1, 2005 to the present.

BNSF Response: BNSF objects to this Request to the extent it seeks information relating to UP trains operating on the Joint Line. BNSF further objects to this Requests to the extent it seeks information that is not maintained by BNSF in the normal course of business, that is not maintained by BNSF in the format requested, or that would require a special study to compile or to report in the format requested. Subject to and without

waiving its specific and general objections. BNSF will produce responsive, non-privileged documents sufficient to show the number of BNSF trains moving over the rail lines in the Orin, Campbell and Black Hills Sub-Divisions to the extent such information is reasonably available. BNSF further states that information for the year 2005 is not reasonably available.

Request for Production Number 10:

Produce copies of documents sufficient to show the number of tons of Coal moving each year over the Joint Line and BNSF's Black Hills Sub-Division for the period between January 1, 1984 and the present; including, but not limited to, documents sufficient to show the tons moved for each year by each railroad serving the Joint Line and in total.

BNSF Response: BNSF objects to this Request to the extent it seeks information relating to UP trains operating on the Joint Line. Subject to and without waiving its specific and general objections, BNSF will produce responsive, non-privileged documents sufficient to show the tons of coal moved by BNSF over the Joint Line and BNSF's Black Hills Sub-Division during the requested time period to the extent such information is reasonably available.

Request for Production Number 11:

Produce copies of documents sufficient to show the number of coal trains moving each year over the Joint Line and BNSF's Black Hills Sub-Division for the period between January 1, 1984 and the present (with sufficient detail to permit a separate identification of the number of loaded coal trains and the number of empty coal trains for each year and for each carrier for the Joint line, and with sufficient detail to permit a separate identification of the number of loaded coal trains and the number of empty coal trains for each year for BNSF's Black Hills Sub-Division).

BNSF Response: BNSF objects to this Request to the extent it seeks information relating to UP trains operating on the Joint Line. BNSF further objects to this Request to

the extent it seeks information that is not maintained by BNSF in the normal course of business, that is not maintained by BNSF in the format requested, or that would require a special study to compile or to report in the format requested on grounds that such requests are overly broad, unduly burdensome, and beyond the permissible scope of discovery. Subject to and without waiving its specific and general objections, BNSF will produce responsive, non-privileged documents sufficient to show the number of BNSF trains operating over the Joint Line and BNSF's Black Hills Sub-Division during the requested time period to the extent such information is reasonably available.

Request for Production Number 12:

Produce copies of all documents showing the details supporting BNSF's costs, separately for track, switches and crossings, for the entire BNSF system, for each year from January 1, 1984 to the present, related to:

- a. The cost of removing fouled ballast;
- b. The cost of cleaning ballast;
- c. The cost of undercutting; and,
- d. The cost of correcting drainage problems.

BNSF Response: BNSF objects to this Request to the extent it seeks "all documents" relating to the matters described in subsections (a) – (d) on grounds that the Request is overly broad and unduly burdensome in light of the nature of this proceeding, including the highly compressed discovery period. BNSF further objects to this Request to the extent it seeks documents from years prior to January 1, 2005 on grounds that the Request is overly broad, unduly burdensome and seeks information that is neither relevant nor likely to lead to the discovery of admissible evidence. BNSF further objects to this Request to the extent it seeks information that is not maintained by BNSF in the normal course of business, that is not maintained by BNSF in the format requested, or

that would require a special study to compile or to report in the format requested on grounds that such a request is overly broad, unduly burdensome, and beyond the permissible scope of discovery. BNSF further objects to subpart (d) of this Request on grounds that the meaning of "correcting draining problems" is vague and that BNSF does not maintain information in the normal course of business concerning costs of "drainage problems." Subject to and without waiving its specific and general objections, BNSF will produce non-privileged, responsive information sufficient to show the cost for removing fouled ballast, of cleaning ballast, and undercutting for the entire BNSF system for the years for which BNSF maintains such information, to the extent that such information is reasonably available.

Request for Production Number 13:

Produce copies of all documents identifying the quantities (e.g., cubic yards of ballast, miles of undercutting, etc.) associated with the costs provided in response to Request for Production No. 12 above.

BNSF Response: BNSF objects to this Request to the extent it seeks "all documents" relating to the matters described in Request No. 12 on grounds that the Request is overly broad and unduly burdensome in light of the limited focus and expedited schedule of this proceeding. BNSF further objects to this Request to the extent it seeks documents from years prior to January 1, 2005 on grounds that the Request is overly broad, unduly burdensome and seeks information that is neither relevant nor likely to lead to the discovery of admissible evidence. BNSF further objects to this Request to the extent it seeks information that is not maintained by BNSF in the normal course of business, that is not maintained by BNSF in the format requested, or that would require a

special study to compile or to report in the format requested. BNSF further objects to this Request to the extent it seeks information relating to "drainage problems" on grounds that the meaning of "drainage problems" is vague and that BNSF does not maintain information in the normal course of business concerning costs of "correcting drainage problems." Subject to and without waiving its specific and general objections, BNSF will produce non-privileged, responsive information sufficient to show quantities for the three costs identified in BNSF's Response to Request for Production Number 12 for the years for which BNSF maintains such information, to the extent that such information is reasonably available.

Request for Production Number 14:

Produce copies of all documents showing the details supporting the total costs, separately for track, switches and crossings, for the Joint Line and BNSF's Black Hills Sub-Division, for each year from January 1, 1984 to the present, related to:

- a. The cost of removing fouled ballast;
- b. The cost of cleaning ballast;
- c. The cost of undercutting; and,
- d. The cost of correcting drainage problems.

BNSF Response: BNSF objects to this Request to the extent it seeks "all documents" relating to the matters described in subsections (a) – (d) on grounds that the Request is overly broad and unduly burdensome in light of the limited focus and expedited schedule of this proceeding. BNSF further objects to this Request to the extent it seeks documents from years prior to January 1, 2005 on grounds that the Request is overly broad, unduly burdensome and seeks information that is neither relevant nor likely to lead to the discovery of admissible evidence. BNSF further objects to this Request to the extent it seeks information that is not maintained by BNSF in the normal course of

business, that is not maintained by BNSF in the format requested, or that would require a special study to compile or to report in the format requested. BNSF further objects to subpart (d) of this Request on the grounds that the meaning of "drainage problems" is vague and that BNSF does not maintain information in the normal course of business concerning costs of "correcting drainage problems." Subject to and without waiving its specific and general objections, BNSF will produce non-privileged, responsive information sufficient to show the costs for removing fouled ballast, of cleaning ballast, and undercutting for the Joint Line and BNSF's Black Hills Sub-Division for the years for which BNSF maintains such information, to the extent that such information is reasonably available.

Request for Production Number 15:

Produce all copies of documents identifying the quantities (e.g., cubic yards of ballast, miles of undercutting, etc.) associated with the costs provided in Request for Production No. 14 above.

BNSF Response: BNSF objects to this Request to the extent it seeks "all documents" relating to the matters described in Request No. 14 on grounds that the Request is overly broad and unduly burdensome in light of the limited focus and expedited schedule of this proceeding. BNSF further objects to this Request to the extent it seeks documents from years prior to January 1, 2005 on grounds that the Request is overly broad, unduly burdensome and seeks information that is neither relevant nor likely to lead to the discovery of admissible evidence. BNSF further objects to this Request to the extent it seeks information that is not maintained by BNSF in the normal course of business, that is not maintained by BNSF in the format requested, or that would require a

special study to compile or to report in the format requested on grounds that such a request is overly broad, unduly burdensome, and beyond the permissible scope of discovery. BNSF further objects to this Request to the extent it seeks information relating to "drainage problems" on grounds that the meaning of "draining problems" is vague and that BNSF does not maintain information in the normal course of business concerning costs of "correcting drainage problems." Subject to and without waiving its specific and general objections, BNSF will produce non-privileged, responsive information sufficient to show quantities for the three costs identified in BNSF's Response to Request for Production Number 14 for the years for which BNSF maintains such information, to the extent that such information is reasonably available.

Request for Production Number 16:

Produce copies of all documents, manuals, studies or analyses relating or referring to BNSF's standards and/or procedures for determining the appropriate frequency and/or basis for performing undercutting.

BNSF Response: BNSF objects to this Request to the extent it seeks "all documents, manuals, studies or analyses" relating to BNSF's standards or procedures for performing undercutting on grounds that the Request is overly broad and unduly burdensome in light of the nature of this proceeding, including the highly compressed discovery period. Subject to and without waiving its specific and general objections, BNSF will produce non-privileged, responsive documents sufficient to describe BNSF's standards and/or procedures for determining the appropriate frequency and/or basis for performing undercutting to the extent such documents are reasonably available.

Request for Production Number 17:

Produce copies of all documents, manuals, studies or analyses relating or referring to BNSF's standards and/or procedures for determining the appropriate frequency and/or basis for cleaning ballast.

BNSF Response: BNSF objects to this Request to the extent it seeks "all documents, manuals, studies or analyses" relating to BNSF's standards or procedures for cleaning ballast on grounds that the Request is overly broad and unduly burdensome in light of the nature of this proceeding, including the highly compressed discovery period. Subject to and without waiving its specific and general objections, BNSF will produce non-privileged, responsive documents sufficient to describe BNSF's standards and/or procedures for determining the appropriate frequency and/or basis for cleaning ballast to the extent such documents are reasonably available.

Request for Production Number 18:

Produce copies of all documents, manuals, studies or analyses relating or referring to BNSF's standards and/or procedures for evaluating the need to correct drainage problems in track structures.

BNSF Response: BNSF objects to this Request to the extent it seeks "all documents" relating to BNSF's standards and/or procedures for "the need to correct drainage problems in track structures" on grounds that the Request is overly broad and unduly burdensome in light of the nature of this proceeding, including the highly compressed discovery period. BNSF further objects to this Request on the grounds that the meaning of the phrase "to correct drainage problems in track structures" is vague.

Request for Production Number 19:

Produce copies of all documents, studies or analyses relating to the costs for:

- a. Coal dust suppression;
- b. Chemicals sprayed on coal to reduce the loss of coal in transit including but not limited to costs for chemical transportation and costs related to ensuring an adequate supply of water to facilitate the spraying process;
- c. The covering of coal cars to reduce the loss of coal in transit; and
- d. Any other methodology BNSF has evaluated to reduce the loss of coal in transit.

BNSF Response: BNSF objects to this Request to the extent it seeks “all documents, studies or analyses” relating to costs for the matters described in subsections (a) – (d) on grounds that the Request is overly broad and unduly burdensome in light of the nature of this proceeding, including the highly compressed discovery period. Subject to and without waiving its specific and general objections, BNSF will conduct a search for responsive materials that is commensurate with the nature and expedited schedule of this proceeding.

Request for Production Number 20:

Provide copies of all documents that relate or refer to environmental analyses pertaining to the accumulation of coal dust on the Joint Line and/or BNSF’s Black Hills Sub-Division.

BNSF Response: BNSF objects to this Request to the extent it seeks “all documents” relating to environmental analyses pertaining to the accumulation of coal dust on the Joint Line or BNSF’s Black Hills Sub-Division on grounds that the Request is overly broad and unduly burdensome in light of the nature of this proceeding, including the highly compressed discovery period. Subject to and without waiving its specific and general objections, BNSF will conduct a search for responsive materials that is commensurate with the nature and expedited schedule of this proceeding.

Request for Production Number 21:

Provide copies of all documents that quantify, relate or refer to the costs that shippers may incur as a result of the implementation of the provisions in Items 100 and 101 in BNSF's Price List 6041-B.

BNSF Response: BNSF objects to this Request to the extent it seeks "all documents" relating to the costs that shippers may incur as a result of the implementation of the provisions in Items 100 and 101 in BNSF's Price List 6042-B on grounds that the Request is overly broad and unduly burdensome in light of the nature of this proceeding, including the highly compressed discovery period. Subject to and without waiving its specific and general objections, BNSF will conduct a search for responsive materials that is commensurate with the nature and expedited schedule of this proceeding.

Request for Production Number 22:

Provide copies of all documents that quantify, relate or refer to the costs that shippers may incur for any treatment of coal to prevent the loss of coal in transit.

BNSF Response: BNSF objects to this Request to the extent it seeks "all documents" relating to the costs that shippers may incur for any treatment of coal to prevent the loss of coal in transit on grounds that the Request is overly broad and unduly burdensome in light of the nature of this proceeding, including the highly compressed discovery period. Subject to and without waiving its specific and general objections, BNSF will conduct a search for responsive materials that is commensurate with the nature and expedited schedule of this proceeding.

Request for Production Number 23:

Produce copies of all documents, studies or analyses that quantify, relate or refer to the dollar amount of costs for undercutting, ballast cleaning, and/or drainage problem correction or remediation that is included in the rates paid by coal shippers.

BNSF Response: BNSF objects to this Request to the extent it seeks "all documents, studies or analyses" relating to the costs of undercutting, ballast cleaning, and/or drainage problem correction that is included in the rates paid by coal shippers on grounds that the Request is overly broad and unduly burdensome in light of the nature of this proceeding, including the highly compressed discovery period. BNSF further objects to this Request on grounds that it seeks information that is neither relevant nor likely to lead to the discovery of admissible evidence. Subject to and without waiving its specific and general objections, BNSF will conduct a search for responsive materials that is commensurate with the nature and expedited schedule of this proceeding.

Request for Production Number 24:

Produce copies of all documents, studies or analyses that quantify, relate or refer to the capacity on the rail lines in the Joint Line and BNSF's Black Hills Sub-Division.

BNSF Response: BNSF objects to this Request to the extent it seeks "all documents, studies or analyses" relating to the capacity on the rail lines in the Joint Line and BNSF's Black Hills Sub-Division on grounds that the Request is overly broad and unduly burdensome in light of the nature of this proceeding, including the highly compressed discovery period. Subject to and without waiving its specific and general objections, BNSF will produce non-privileged, responsive documents sufficient to show

the capacity on the rail lines in the Joint Line and Black Hills Sub-Division to the extent they are reasonably available.

Request for Production Number 25:

Produce copies of all documents, studies or analyses that quantify, relate or refer to the profits that BNSF has lost or may lose as a result of reduce[d] operations to allow for maintenance on the rail lines in the Joint Line and BNSF's Black Hills Sub-Division.

BNSF Response: BNSF objects to this Request to the extent it seeks "all documents, studies or analyses" relating to the "profits that BNSF has lost or may lose as a result of reduce[d] operations to allow for maintenance on the rail lines" on grounds that the Request is overly broad and unduly burdensome in light of the nature of this proceeding, including the highly compressed discovery period. BNSF further objects to this Request on grounds that it seeks information that is neither relevant nor likely to lead to the discovery of admissible evidence. Subject to and without waiving its specific and general objections, BNSF will conduct a search for responsive materials that is commensurate with the nature and expedited schedule of this proceeding.

Request for Production Number 26:

Produce copies of all documents, studies or analyses created on or after January 1, 2005 relating or referring, for each unit train of coal traffic traversing the Joint Line and/or BNSF's Black Hills Sub-Division, to:

- a. The revenues received by BNSF;
- b. The profits received by BNSF; and
- c. The costs incurred by BNSF.

BNSF Response: BNSF objects to this Request to the extent it seeks "all documents, studies or analyses" relating to the matters described in subsections (a) – (c) on grounds that the Request is overly broad and unduly burdensome in light of the

limited focus and expedited schedule of this proceeding. BNSF further objects to this Request on grounds that it seeks highly sensitive information that is neither relevant nor likely to lead to the discovery of admissible evidence. BNSF further objects to this Request to the extent it seeks information relating to BNSF's internal management cost data on grounds that such information is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence and is beyond the permissible scope of discovery. BNSF further objects to this Request to the extent it seeks information that is not maintained by BNSF in the normal course of business, that is not maintained by BNSF in the format requested, or that would require a special study to compile or to report in the format requested. BNSF further objects to this Request on grounds that it calls for production of highly sensitive third-party proprietary information, including information that, if produced, could result in the violation of a contractual obligation to third parties.

Request for Production Number 27:

For the documents, studies, or analyses produced in response to Request for Production No. 26(c) above, provide documents sufficient to show how the costs were developed including, but not limited to, documents showing the time period of the costs, the unit costs utilized to calculate the costs and the traffic operating factors applied to the unit costs.

BNSF Response: See BNSF's objections to Request No. 26 above, which are incorporated and restated in response to Request No. 27.

Request for Production Number 28:

Provide copies of all field tests performed to identify the impact of coal dust for each train or partial train studied and that moved on the Joint Line and/or BNSF's Black Hills Sub-Division. For each train or partial train studied provide:

- a. The field test plan or approach;
- b. The locations and types of monitors used (including all passive, electronic, meteorological, and related equipment) regardless of the location where such equipment is mounted – e.g., on a railcar or at a fixed location;
- c. Description, quantity and cost of the coal treatment, if any, by specific mine;
- d. The study results for each train or partial train studied including but not limited to all collected raw data and all manipulated, reduced, graphically presented, and/or converted data; and
- e. Copies of any and all calibration data for any equipment used in such field tests.

BNSF Response: BNSF objects to this Request to the extent it seeks “all” field tests on grounds that the Request is overly broad and unduly burdensome in light of the nature of this proceeding, including the highly compressed discovery period. BNSF further objects to this Request to the extent it seeks information that is not maintained by BNSF in the normal course of business, that is not maintained by BNSF in the format requested, or that would require a special study to compile or to report in the format requested. Subject to and without waiving its specific and general objections, BNSF will conduct a search for responsive materials that is commensurate with the nature and expedited schedule of this proceeding.

Request for Production Number 29:

To the extent that BNSF has had contracts with any other entity in effect from January 1, 2005 to the present for the collection, transportation and/or sale of the coal dust that BNSF removes from ballast on the Joint Line during ballast cleaning and/or undercutting operations, please identify such entity or entities and please produce copies of all contracts (and any supplements or amendments thereto) governing such collection, transportation and/or sale.

BNSF Response: BNSF objects to this Request to the extent it seeks information about “all” contracts with “any other entity” for the “collection, transportation and/or sale

of the coal dust that BNSF removes from ballast on the Joint Line" regardless of the amount of work performed by such entity or the relevance of that work to the issues in this case on grounds that such Request is overly broad and unduly burdensome in light of the limited focus and expedited schedule of this proceeding. BNSF further objects to this Request to the extent it seeks third-party, proprietary information, including information that, if produced, could result in violation of any contractual obligation to third parties.

Request for Production Number 30:

Produce all documents identified in your answer to Interrogatory No. 1, supra.

BNSF Response: BNSF states that it did not identify any documents in its response to Interrogatory Number 1.

Request for Production Number 31:

Produce all documents identified in your answer to Interrogatory No. 2, supra.

BNSF Response: BNSF states that it did not identify any documents in its response to Interrogatory Number 2.

Request for Production Number 32:

Produce all documents identified in your answer to Interrogatory No. 3, supra.

BNSF Response: Subject to and without waiving its general objections, BNSF will produce the materials described in its response to Interrogatory No. 3.

Request for Production Number 33:

Produce all documents identified in your answer to Interrogatory No. 4, supra.

BNSF Response: Subject to and without waiving its general objections, BNSF will produce the materials described in its response to Interrogatory Number 4.

Request for Production Number 34:

Produce all documents identified in your answer to Interrogatory No. 5, supra.

BNSF Response: BNSF states that it did not identify any documents in its response to Interrogatory Number 5.

Request for Production Number 35:

Produce all documents identified in your answer to Interrogatory No. 6, supra.

BNSF Response: BNSF states that it did not identify any documents in its response to Interrogatory Number 6.

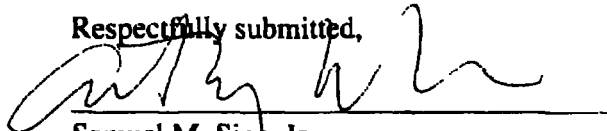
Request for Production Number 36:

Produce all documents identified in your answer to Interrogatory No. 7, supra.

BNSF Response: As stated in response to Interrogatory No. 7, BNSF will produce the names of persons whose files were searched in response to these discovery requests.

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Respectfully submitted,



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January 8, 2010

CERTIFICATE OF SERVICE

I hereby certify that on January 8, 2010, I have caused copies of the foregoing to be served (1) by e-mail and by first-class mail on the following parties of record:

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Kathryn J. Gainey

EXHIBIT D

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Finance Docket No. 35305

**PETITION OF ARKANSAS ELECTRIC
COOPERATIVE FOR A DECLARATORY ORDER**

**BNSF RAILWAY COMPANY'S RESPONSES AND OBJECTIONS TO THE
SECOND SET OF INTERROGATORIES AND REQUESTS FOR
PRODUCTION OF DOCUMENTS OF WESTERN COAL TRAFFIC
LEAGUE AND CONCERNED CAPTIVE COAL SHIPPERS**

BNSF Railway Company ("BNSF"), pursuant to 49 C.F.R. §§ 1114.26 and 1114.30, hereby responds and objects to the Second Set of Interrogatories and Requests for Production of Documents served by Western Coal Traffic League and Concerned Captive Coal Shippers on December 30, 2009 ("WCTL's Second Set of Discovery Requests").

**GENERAL OBJECTIONS AND
OBJECTIONS TO DEFINITIONS AND INSTRUCTIONS**

The following general objections and objections to definitions and instructions are made with respect to WCTL's Second Set of Discovery Requests.

1. BNSF objects to WCTL's Second Set of Discovery Requests to the extent they seek documents that contain confidential and proprietary information relating to

third parties, including information that, if produced, could result in the violation of any contractual obligation to third parties or could violate 49 U.S.C. § 11904.

2. BNSF objects to WCTL's Second Set of Discovery Requests to the extent they seek disclosure of documents that are protected by the attorney-client privilege, work product doctrine, and/or any other appropriate privilege or doctrine. Any production of privileged or otherwise protected documents is inadvertent and shall not constitute a waiver of any claim of privilege or other protection.

3. BNSF objects to WCTL's Second Set of Discovery Requests to the extent they seek production of "all documents," "all communications," or "all field studies, analyses, and reports" relating to subjects specified in particular requests on grounds that those requests are overly broad and unduly burdensome in light of the nature of this proceeding, including the highly compressed discovery period. BNSF will conduct a file search that is commensurate with the nature and expedited schedule of this proceeding.

4. BNSF objects to WCTL's Second Set of Discovery Requests to the extent they seek production of information or documents in computer-readable format to the extent that production in such format would be an unduly burdensome and oppressive task.

5. BNSF objects to WCTL's Second Set of Discovery Requests to the extent they request that BNSF continue to produce responsive materials that are created beyond the close of discovery as set out in the Surface Transportation Board's order served on December 1, 2009.

6. BNSF objects to WCTL's Second Set of Discovery Requests to the extent they seek information or documents created before January 1, 2005 on grounds that such requests are overly broad, unduly burdensome, and seek information that is neither relevant nor reasonably calculated to the discovery of admissible evidence.

7. BNSF objects to the definition of "BNSF" on the basis that it is overly broad, unduly burdensome, and beyond the scope of permissible discovery to the extent it seeks information or requires the production of documents that are not in the possession, custody, or control of BNSF, including, for example, documents in the possession of former employees, directors, consultants, and all other persons acting (or who have acted) on BNSF's behalf. BNSF further objects to the definition of "BNSF" to the extent it seeks information or documents in the possession of "any contractors retained to perform services in connection with coal transportation services relating to the coal movements affected by this proceeding." Subject to this objection, BNSF will produce information or documents that are reasonably available from its two primary coal dust consulting firms, Simpson Weather Associates ("SWA") and Conestoga-Rovers & Associates ("CRA"), that relate to the principal consulting activities that those firms performed for BNSF.

8. BNSF objects to the definitions of "document(s)" and "related," "related to," and "relating to" on grounds that they are overly broad, unduly burdensome, and beyond the scope of permissible discovery to the extent they require BNSF to search files where there is not a reasonable likelihood of finding responsive documents or include

materials that are not in BNSF's possession, custody, or control, including information about or documents from Union Pacific Railroad Company ("UP").

9. BNSF objects to WCTL's Second Set of Discovery Requests to the extent they seek information that is not maintained by BNSF in the normal course of business, that is not maintained by BNSF in the format requested, or that would require a special study to compile or to report in the format requested on grounds that such requests are overly broad, unduly burdensome, and beyond the permissible scope of discovery.

10. BNSF objects to Instruction Number 2 on grounds that it is overly broad, unduly burdensome and beyond the scope of permissible discovery to the extent it requires BNSF to provide detailed information or descriptions about data produced in computer readable-format. BNSF further objects to Instruction Number 2(a) on grounds that it is overly broad, unduly burdensome and beyond the scope of permissible discovery to the extent it seeks computer programs and intermediate files used in deriving responsive data.

11. BNSF objects to Instruction Number 3 on grounds that it is overly broad and unduly burdensome to the extent it seeks information that is not necessary to enable WCTL to assess the grounds for withholding of a document. BNSF further objects to Instruction Number 6 on grounds that it is overly broad, unduly burdensome, and beyond the scope of permissible discovery.

12. BNSF objects to Instruction Number 7 on grounds that it is overly broad and unduly burdensome to the extent it requires BNSF to identify each discovery request to which a document may be partially responsive.

13. BNSF incorporates these General Objections and Objections to Definitions and Instructions into each Response below as if fully set forth therein.

RESPONSES AND OBJECTIONS TO INTERROGATORIES

Interrogatory Number 8:

Please state whether any of the dust monitoring and/or IDV analysis performed by BNSF and/or Simpson Weather Associates, Inc. ("SWA") on the Joint Line and/or the Black Hills Sub-Division has been submitted in whole or in part for peer review or critique by any member of the technical and/or academic community involved in air quality, air quality monitoring, dust monitoring, industrial hygiene, and/or other related field of expertise.

BNSF Response: BNSF objects to Interrogatory No. 8 to the extent it refers to "other related field of expertise" on grounds that such reference is vague and undefined. Subject to and without waiving its objections, BNSF states that the dust monitoring and/or IDV analysis performed by BNSF and/or by SWA for BNSF on the Joint Line and/or Black Hills Sub-Division has not been submitted for peer review by a firm specializing in air quality, air quality monitoring, dust monitoring or industrial hygiene.

Interrogatory Number 9:

Please state whether the design and use of the passive collectors used by BNSF and/or SWA on the Joint Line and/or the Black Hills Sub-Division have ever been analyzed, critiqued, and/or peer-reviewed for performance by any member of the technical and/or academic community involved in air quality, air quality monitoring, dust monitoring, industrial hygiene, and/or other related field of expertise.

BNSF Response: BNSF objects to Interrogatory No. 9 to the extent it refers to "other related field of expertise" on grounds that such reference is vague and undefined. Subject to and without waiving its objections, BNSF states that the design and use of passive collectors used by BNSF and/or by SWA for BNSF on the Joint Line and/or the

Black Hills Sub-Division has not been analyzed, critiqued, and/or peer-reviewed for performance by a firm specializing in air quality, air quality monitoring, dust monitoring or industrial hygiene.

Interrogatory Number 10:

Please describe in detail any and all calibration procedures, routines, techniques, and/or protocols that have been performed on the TSM E-Samplers by BNSF or SWA since they were installed at each respective TSM site on the Joint Line and/or the Black Hills Sub-Division.

BNSF Response: BNSF objects to Interrogatory No. 10 to the extent it seeks information about each calibration procedure, routine, technique, and/or protocol relating to each TSM E-Sampler installed on the Joint Line and/or Black Hills Sub-Division on grounds that such request is overly broad and unduly burdensome. Subject to and *without waiving its objections, BNSF states that Met One Instruments, the manufacturer of the E-Sampler dust monitor, recommends that the dust monitors be calibrated every 2 years. However, the dust monitors are exposed in the field for 2 months then shipped to the manufacturer for "As Received" testing, cleaning, and calibration. The "As Received" testing allows for determination of signal drift during the exposure period. Typically, the exposed dust monitors' signals are within 10% of a calibration unit, which is considered within manufacturer tolerance. The calibration verifies the accuracy of the dust monitor signal and flow values. In addition to the bi-monthly manufacturer calibration, the dust monitors are programmed to self-calibrate every 12 hours verifying the dust signal and pump flow. The unit also corrects for optical cleanliness by adjusting the output dust signal "background" level during this self-calibration period.*

Interrogatory Number 11:

Please explain whether BNSF and/or SWA used filter-based manual samplers in conjunction with the E-Samplers on the Joint Line and/or the Black Hills Sub-Division in order to field calibrate the electronic continuous dust monitoring devices, as recommended by the manufacturer of the E-Samplers. Please explain why BNSF and/or SWA used or did not use filter-based manual samplers for such calibration purposes.

BNSF Response: BNSF objects to Interrogatory No. 11 on grounds that the reference to "filter-based manual samplers" is vague and undefined. Subject to and without waiving its objections, BNSF states that BNSF and/or SWA have not used a separate filter-based sampler in conjunction with the E-Samplers on the Joint Line and/or the Black Hills Sub-Division for calibration purposes. BNSF further states that the use of a separate device for calibration purposes was not appropriate or necessary.

Interrogatory Number 12:

Please identify the method used by BNSF and/or SWA to clean, zero, weigh, and check the collected material measurements from the passive collectors in conjunction with the over-the-road field testing on the Joint Line and/or the Black Hills Sub-Division.

BNSF Response: Subject to and without waiving its general objections, BNSF states that the methods it has used to assess the materials collected in passive collectors used in over-the-road field testing have evolved over time. When BNSF first started using the passive collectors, BNSF used the following measurement method. BNSF first weighed the removable trays on the bottom of the passive collectors prior to the test and then subtracted that tare weight from the final weight of the tray after the test was complete to determine the amount of coal that was collected during the test. If the samples were wet, BNSF would dry the samples before weighing. All weighing was done with a certified lab scale.

After a period of time, BNSF changed its measurement method from weighing the passive collector trays to transferring the materials from the trays to plastic bags and forwarding the bags with the collected materials to Topeka for final weighing. Weights were taken in the field if the samples were dry. Even when samples were dry, they would still be sent to the Topeka lab and the samples reweighed. If the samples were wet, the bags would be rinsed with water to remove the coal from the bag and the contents transferred to a weighed beaker. The beaker and contents would be dried in a large laboratory oven at 105 degrees Celsius until dry, then reweighed.

In 2008, BNSF's measurement methods changed once again, and BNSF began applying the bags to the passive collector trays at the start of the test so that the materials would be collected directly into the bags. The bags were then removed at the end of the test. Weighing of dry and wet samples was carried out as described above.

Interrogatory Number 13:

Please state whether, and if so, how often, BNSF and/or SWA have performed 2.0 liter/minute flow calibrations for E-Samplers at any and all TSMs on the Joint Line and/or the Black Hills Sub-Division. If BNSF and/or SWA have performed such calibrations, please identify the results of those efforts.

BNSF Response: BNSF objects to Interrogatory No. 13 to the extent it seeks information about specific calibrations at any and all TSMs on the Joint Line and/or Black Hills Sub-Division on grounds that such request is overly broad and unduly burdensome. Subject to and without waiving its objections, BNSF states that the calibration of TSMs is described in response to Interrogatory No. 10 above.

Interrogatory Number 14:

Please identify all prior statements from BNSF and/or SWA (and supporting documentation and research) regarding: (i) the K-factor for the E-Samplers used in the TSMs to monitor coal dust on the Joint Line and/or the Black Hills Subdivision; and (ii) the claim that the uncertainty in the K-factor for those E-Samplers is accounted for or otherwise ameliorated through the IDV method.

BNSF Response: BNSF objects to Interrogatory No. 14 to the extent it requests BNSF to identify all statements, oral or written, regarding the specified issues on grounds that such a request is overly broad, unduly burdensome and beyond the scope of permissible discovery. Subject to and without waiving its objections, BNSF will produce any non-privileged, written statements by BNSF and/or SWA relating to subparts (i)-(ii) that can be located in a search that is commensurate with the nature and expedited schedule of this proceeding.

Interrogatory Number 15:

Please identify any analyses that have been performed by BNSF and/or SWA to evaluate the side-to-side variability of multiple E-Samplers and/or additional real-time continuous dust monitors when operated in the same location for the same period of time.

BNSF Response: Subject to and without waiving its general objections, BNSF will produce documents containing non-privileged information relating to the variability of E-Samplers to the extent such documents are reasonably available.

Interrogatory Number 16:

Please identify any steps taken by BNSF and/or SWA in conjunction with their coal dust monitoring on the Joint Line and/or the Black Hills Sub-Division to address issues of: (i) analog output signal drift; (ii) E-Sampler digital-to-analog converter calibration; and (iii) optical system cleanliness.

BNSF Response: Subject to and without waiving its general objections, BNSF states that information responsive to subsections (i) and (iii) of Interrogatory No. 16 is contained in BNSF's response to Interrogatory No. 10 above. BNSF further states that no steps were taken by BNSF and/or SWA in conjunction with their coal dust monitoring on the Joint Line and/or the Black Hills Sub-Division to address E-Sampler digital-to-analog converter calibration.

Interrogatory Number 17:

Please identify any analyses performed by BNSF and/or SWA to characterize the material collected in each passive collector during over-the-road field testing on the Joint Line and/or the Black Hills Sub-Division to distinguish between coal dust, vegetation matter, insects, diesel soot, and/or other non-coal dust material.

BNSF Response: Subject to and without waiving its general objections, BNSF states that any foreign materials, primarily moths or bugs, that were collected in the passive collectors were physically removed from the samples before the samples were weighed. As to diesel soot, the passive collectors were placed on cars that were 10-20 cars from the last locomotive in the lead consist in order to eliminate concerns about contamination from locomotive soot.

Interrogatory Number 18:

Please identify all field studies, analyses, tests, and/or other tasks performed by BNSF or SWA to study, analyze, establish, and/or correlate the measurements of total material sampled in the continuous dust monitoring devices (such as the E-Samplers), passive collectors, and dustfall collectors (or dustfall "buckets") on the Joint Line and/or the Black Hills Sub-Division to the claimed amount of coal dust accumulated on the railroad tracks and/or ballast.

BNSF Response: Subject to and without waiving its general objections, BNSF states that neither BNSF nor SWA on BNSF's behalf conducted specific field studies.

analyses, tests and/or other tasks for the express purpose of correlating the amount of materials collected in dust monitoring devices to the amount of coal dust accumulated on the railroad tracks and/or ballast.

Interrogatory Number 19:

Please identify, by name, title and address, the person(s) who prepared each answer to these Interrogatories and who reviewed and selected the documents to be produced in response to each of the following Requests for Production of Documents.

BNSF Response: BNSF objects to this Interrogatory to the extent it requests the names of persons that reviewed and selected documents to be produced in response to particular document requests on grounds that such a request is beyond the scope of permissible discovery and seeks information that is protected from disclosure by the attorney-client privilege and the work product doctrine. Subject to and without waiving its specific and general objections, BNSF states that it will produce the names of persons whose files were searched in response to these discovery requests. BNSF further states that William VanHook, AVP, Chief Engineer, Systems, Maintenance and Planning, was primarily responsible for preparing the answers to these Interrogatories with input from Glenn Bowen, Technical Research and Development (Interrogatory Nos. 12 and 17) and E. Daniel Carre and George D. Emmitt of Simpson Weather Associates (Interrogatory Nos. 8, 9, 10, 11, 13, 16, and 18).

RESPONSES AND OBJECTIONS TO DOCUMENT REQUESTS

Request for Production Number 37:

Please produce all studies, analyses, and reports referring or relating to any variability or any lack of variability in the accumulation of coal dust along the length of the Joint Line and/or the Black Hills Sub-Division.

BNSF Response: BNSF objects to this Request to the extent it seeks "all studies, analyses, and reports" relating to the variability or lack of variability in the accumulation of coal dust along the length of the Joint Line or Black Hills Sub-Division on grounds that the Request is overly broad and unduly burdensome in light of the nature of this proceeding, including the highly compressed discovery period. Subject to and without waiving its specific and general objections, BNSF will conduct a search for responsive, non-privileged materials that is commensurate with the nature and expedited schedule of this proceeding.

Request for Production Number 38:

Please produce all documents referring or relating to BNSF's efforts to maintain and/or modify its fleet of bottom-dump coal cars following the 2005 Joint Line derailments in order to reduce the amount of coal that falls from the bottoms of those cars while in transit.

BNSF Response: BNSF objects to this Request to the extent it seeks "all documents" relating to BNSF's efforts to maintain and/or modify its fleet of bottom-dump coal cars following the 2005 Joint Line derailments on grounds that the Request is overly broad and unduly burdensome in light of the nature of this proceeding, including the highly compressed discovery period. Subject to and without waiving its specific and general objections, BNSF will produce non-privileged, responsive documents sufficient

to describe BNSF's efforts to maintain and/or modify its fleet of bottom-dump coal cars following the 2005 Joint Line derailments to the extent such information is reasonably available.

Request for Production Number 39:

Please produce all communications between BNSF and the Surface Transportation Board and/or between BNSF and the Rail Energy Transportation Advisory Committee regarding coal dust accumulation, coal dust monitoring, and/or any efforts to minimize coal dust emission from railroad cars.

BNSF Response: BNSF objects to this Request to the extent it seeks "all communications" relating to coal dust accumulation, coal dust monitoring, or efforts to minimize coal dust emission from railroad cars between BNSF and the Surface Transportation Board or the Rail Energy Transportation Advisory Committee on grounds that the Request is overly broad and unduly burdensome in light of the nature of this proceeding, including the highly compressed discovery period. Subject to and without waiving its specific and general objections, BNSF will conduct a search for responsive, non-privileged materials, if any, other than materials submitted to the Board in the proceeding at issue here, that is commensurate with the nature and expedited schedule of this proceeding.

Request for Production Number 40:

Produce all documents identified in your answer to Interrogatory No. 8.

BNSF Response: BNSF states that it did not identify any documents in its response to Interrogatory Number 8.

Request for Production Number 41:

Produce all documents identified in your answer to Interrogatory No. 9.

BNSF Response: BNSF states that it did not identify any documents in its response to Interrogatory Number 9.

Request for Production Number 42:

Produce all documents identified in your answer to Interrogatory No. 10.

BNSF Response: BNSF states that it did not identify any documents in its response to Interrogatory Number 10.

Request for Production Number 43:

Produce all documents identified in your answer to Interrogatory No. 11.

BNSF Response: BNSF states that it did not identify any documents in its response to Interrogatory Number 11.

Request for Production Number 44:

Produce all documents identified in your answer to Interrogatory No. 12.

BNSF Response: BNSF states that it did not identify any documents in its response to Interrogatory Number 12.

Request for Production Number 45:

Produce all documents identified in your answer to Interrogatory No. 13.

BNSF Response: BNSF states that it did not identify any documents in its response to Interrogatory Number 13.

Request for Production Number 46:

Produce all documents identified in your answer to Interrogatory No. 14.

BNSF Response: Subject to and without waiving its general objections, BNSF will produce the materials described in its response to Interrogatory No. 14.

Request for Production Number 47:

Produce all documents identified in your answer to Interrogatory No. 15.

BNSF Response: Subject to and without waiving its general objections, BNSF will produce the materials described in its response to Interrogatory No. 15.

Request for Production Number 48:

Produce all documents identified in your answer to Interrogatory No. 16.

BNSF Response: BNSF states that it did not identify any documents in its response to Interrogatory Number 16.

Request for Production Number 49:

Produce all documents identified in your answer to Interrogatory No. 17.

BNSF Response: BNSF states that it did not identify any documents in its response to Interrogatory Number 17.

Request for Production Number 50:

Produce all documents identified in your answer to Interrogatory No. 18.

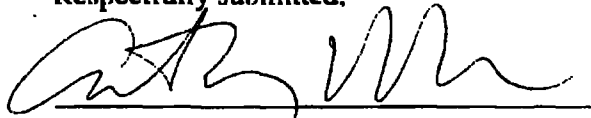
BNSF Response: BNSF states that it did not identify any documents in its response to Interrogatory Number 18.

Request for Production Number 51:

Produce all documents identified in your answer to Interrogatory No. 19.

BNSF Response: BNSF states that it did not identify any documents in its response to Interrogatory Number 19.

Respectfully submitted,

A handwritten signature in black ink, appearing to be 'S M Sipe', written over a horizontal line.

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January 21, 2010

CERTIFICATE OF SERVICE

I hereby certify that on January 21, 2010, I caused a copy of foregoing to be served (1) by hand delivery on the following parties of record in this case:

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EXHIBIT E

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Finance Docket No. 35305

**PETITION OF ARKANSAS ELECTRIC
COOPERATIVE FOR A DECLARATORY ORDER**

**BNSF RAILWAY COMPANY'S RESPONSES AND OBJECTIONS
TO THE FIRST SET OF INTERROGATORIES AND
REQUESTS FOR PRODUCTION OF DOCUMENTS OF
AMEREN ENERGY FUELS AND SERVICES COMPANY**

BNSF Railway Company ("BNSF"), pursuant to 49 C.F.R. §§ 1114.26 and 1114.30, hereby responds and objects to the First Set of Interrogatories and Requests for Production of Documents served by Ameren Energy Fuels and Services Company on January 15, 2010 ("AFS's First Set of Discovery Requests").

**GENERAL OBJECTIONS AND
OBJECTIONS TO DEFINITIONS AND INSTRUCTIONS**

The following general objections and objections to definitions and instructions are made with respect to AFS's First Set of Discovery Requests.

1. BNSF objects to AFS's First Set of Discovery Requests to the extent they seek documents that contain confidential and proprietary information relating to third parties, including information that, if produced, could result in the violation of any contractual obligation to third parties or could violate 49 U.S.C. § 11904.

2. BNSF objects to AFS's First Set of Discovery Requests to the extent they seek disclosure of documents that are protected by the attorney-client privilege, work product doctrine, and/or any other appropriate privilege or doctrine. Any production of privileged or otherwise protected documents is inadvertent and shall not constitute a waiver of any claim of privilege or other protection.

3. BNSF objects to AFS's First Set of Discovery Requests to the extent they seek production of "all documents," "all profile data," or "all other information," relating to subjects specified in particular requests on grounds that those requests are overly broad and unduly burdensome in light of the nature of this proceeding, including the highly compressed discovery period. BNSF will conduct a file search that is commensurate with the nature and expedited schedule of this proceeding.

4. BNSF objects to AFS's First Set of Discovery Requests to the extent they seek production of information or documents in computer-readable format to the extent that production in such format would be an unduly burdensome and oppressive task.

5. BNSF objects to AFS's First Set of Discovery Requests to the extent they request that BNSF continue to produce responsive materials that are created beyond the close of discovery as set out in the Surface Transportation Board's order served on December 1, 2009.

6. BNSF objects to AFS's First Set of Discovery Requests to the extent they seek information or documents created before January 1, 2005 on grounds that such requests are overly broad, unduly burdensome, and seek information that is neither relevant nor reasonably calculated to the discovery of admissible evidence.

7. BNSF objects to the definition of "BNSF" on the basis that it is overly broad, unduly burdensome, and beyond the scope of permissible discovery to the extent it seeks information or requires the production of documents that are not in the possession, custody, or control of BNSF, including, for example, documents in the possession of former employees, directors, consultants, and all other persons acting (or who have acted) on BNSF's behalf.

8. BNSF objects to the definitions of "document" and "relating to" and "relates to" on grounds that they are overly broad, unduly burdensome, and beyond the scope of permissible discovery to the extent they require BNSF to search files where there is not a reasonable likelihood of finding responsive documents or include materials that are not in BNSF's possession, custody, or control, including information about or documents from Union Pacific Railroad Company ("UP").

9. BNSF objects to AFS's First Set of Discovery Requests to the extent they seek information that is not maintained by BNSF in the normal course of business, that is not maintained by BNSF in the format requested, or that would require a special study to compile or to report in the format requested on grounds that such requests are overly broad, unduly burdensome, and beyond the permissible scope of discovery.

10. BNSF objects to AFS's First Set of Discovery Requests to the extent they require BNSF to provide detailed information or descriptions about data produced in computer readable-format.

11. BNSF objects to Instruction Number 5 on grounds that it is overly broad and unduly burdensome to the extent it seeks information that is not necessary to enable AFS to assess the grounds for withholding of a document.

12. BNSF further objects to Instruction Number 6 on grounds that it is overly broad, unduly burdensome, and beyond the scope of permissible discovery.

13. BNSF incorporates these General Objections and Objections to Definitions and Instructions into each Response below as if fully set forth therein.

RESPONSES AND OBJECTIONS TO INTERROGATORIES

Interrogatory No. 1:

Please describe whether BNSF believes that the Coal Dust Problem has increased BNSF's costs or expenses in any way (such as for track maintenance, roadbed maintenance, ballast cleaning, undercutting, derailments, and similar items) since August 16, 1984 above what such costs or expenses would have been were there no Coal Dust Problem. Please explain the reasoning and evidence supporting your answer.

BNSF Response: BNSF objects to this Interrogatory to the extent it seeks information prior to 2005 on grounds that such a request is overly broad, unduly burdensome and seeks information that is neither relevant nor likely to lead to the discovery of admissible evidence. Subject to and without waiving its specific and general objections, BNSF states that it incurred costs associated with two derailments that occurred in May of 2005 on the Joint Line that resulted in part from the accumulation of coal dust along the railroad right of way. BNSF further states that as a general matter coal dust emitted from loaded coal cars in transit contaminates ballast and accumulates in other locations on the railroad right of way and imposes additional costs on BNSF associated with, among other things, extraordinary maintenance and clean up activities.

BNSF further states that BNSF will produce documents from which additional responsive, non-privileged information can be obtained to the extent such documents are reasonably available.

Interrogatory No. 2:

If BNSF does believe that the Coal Dust Problem has increased its costs or expenses in any way since August 16, 1984, please itemize such costs or expenses, providing specific dollar figures and the year in which such costs or expenses were incurred.

BNSF Response: BNSF objects to this Interrogatory to the extent it seeks information prior to 2005 on grounds that such a request is overly broad, unduly burdensome and seeks information that is neither relevant nor likely to lead to the discovery of admissible evidence. BNSF further objects to this Interrogatory to the extent it would require that BNSF undertake a special study. Subject to and without waiving its specific and general objections, BNSF will produce documents from which responsive, non-privileged information can be obtained to the extent such documents are reasonably available.

Interrogatory No. 3:

Please describe if BNSF expects that compliance with the Coal Dust Tariff will result in reduced expenditures by BNSF (on things such as track maintenance, roadbed maintenance, ballast cleaning, undercutting, derailments, and similar items) compared to a scenario where there is not compliance with the Coal Dust Tariff. Please explain the reasoning and evidence supporting your answer.

BNSF Response: Subject to and without waiving its general objections, BNSF states that compliance with the Coal Dust Tariff would significantly reduce the amount of coal dust that is deposited on the railroad right of way and therefore would reduce certain

expenditures that result from coal dust deposits, including, among other things, the extraordinary maintenance and clean up activities imposed by coal dust emissions.

Interrogatory No. 4:

If BNSF does believe that compliance with the Coal Dust Tariff will result in reduced expenditures by BNSF in any way, please itemize such reductions, providing specific dollar figures.

BNSF Response: In addition to its general objections, BNSF objects to this Interrogatory on grounds that it requests that BNSF undertake a special study.

Interrogatory No. 4:

Please list the name, title, and address of each person who prepared answers to these Interrogatories, or reviewed or selected documents to be produced in response to the Requests for Production of Documents.

BNSF Response: William VanHook, AVP, Chief Engineer, Systems, Maintenance and Planning, was primarily responsible for preparing the responses to these Interrogatories.

RESPONSES AND OBJECTIONS TO DOCUMENT REQUESTS

Request for Production Number 1:

Produce copies of all documents relied upon, reviewed, or consulted when answering Interrogatory #1, or relating to your answer to Interrogatory #1.

BNSF Response: Subject to and without waiving its general objections, BNSF will produce the materials described in its response to Interrogatory Number 1.

Request for Production Number 2:

Produce copies of all documents relied upon, reviewed, or consulted when answering Interrogatory #2, or relating to your answer to Interrogatory #2.

BNSF Response: Subject to and without waiving its general objections, BNSF will produce the materials described in its response to Interrogatory Number 2.

Request for Production Number 3:

Produce copies of all documents relied upon, reviewed, or consulted when answering Interrogatory #3, or relating to your answer to Interrogatory #3.

BNSF Response: BNSF states that it did not identify any documents in its response to Interrogatory Number 3.

Request for Production Number 4:

Produce copies of all documents relied upon, reviewed, or consulted when answering Interrogatory #4, or relating to your answer to Interrogatory #4.

BNSF Response: BNSF states that it did not identify any documents in its response to Interrogatory Number 4.

Request for Production Number 5:

Please produce all documents that discuss, analyze, address, or report upon the costs of any method (such as, but not limited to, the Coal Dust Tariff, undercutting, ballast cleaning, reduced train speed, vacuuming, modified or reduced profiling, or modified or reduced loading of coal cars) that relates to the Coal Dust Problem. Please include, but do not limit your response to, all documents which compare the costs of various methods or which describe the financial impact on BNSF of implementing or not implementing the Coal Dust Tariff.

BNSF Response: BNSF objects to this Request to the extent it seeks "all document" that discuss, analyze, address, or report upon the costs of any coal dust mitigation method, that compare the costs of various methods or that describe the financial impact on BNSF of implementing or not implementing the Coal Dust Tariff on grounds that such request is overly broad and unduly burdensome in light of the nature of this proceeding, including the highly compressed discovery period. Subject to and

without waiving its specific and general objections, BNSF states that it will conduct a search for responsive, non-privileged materials that is commensurate with the nature and expedited schedule of this proceeding.

Request for Production Number 6:

Please produce all documents containing any data, reports, studies, test results, or similar information pertaining to evaluations of coal lost from or dust emissions from trains operating in BNSF or UP service to or from the destinations listed below:

plant name	railroad destination
Labadie	West Labadie, MO
Meramec	Hill Crest, MO
Newton	East St. Louis, IL or Lis, IL
Mercedosia	Sauget, IL
Edwards	Sommer, IL
Joppa	Joppa, IL
Coffeen	South Water Tower, IL or Coffeen, IL
Rush Island	Rush Tower, MO
Sioux	Machens, MO
Duck Creek	Dunfermline, IL

Please include, but do not limit your response to, the Integrated Dust Value data and data from the dustfall collectors from BNSF and UP trains operating to the destinations listed above. Please include all other information collected such as instances when a reading was attempted but could not be obtained. Please provide any analyses of dust emissions from these trains, comparisons of these trains or equipment to other shipper trains. Please provide all profile data collected by profiling measurements on these trains from the time that profiling measurements began. Include in your response all trains operating in service to or from the destinations listed above, including trains of both BNSF and the Union Pacific Railroad Company.

BNSF Response: BNSF objects to this Request on grounds that it is overly broad and unduly burdensome in light of the nature of this proceeding, including the highly compressed discovery period. BNSF further objects to this Request to the extent it seeks data relating to transportation provided by Union Pacific Railroad Company. BNSF

further objects to this Request on grounds that it would require BNSF to undertake a special study. Subject to and without waiving its specific and general objections, BNSF states that it will produce the trackside monitor data and corresponding analyses for BNSF's trains providing service to Ameren's Rush Tower and Machens, Missouri destinations.

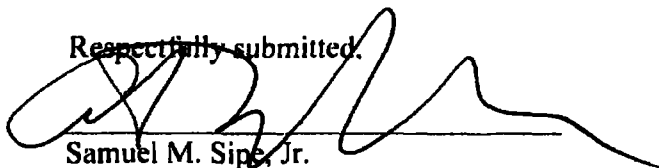
Request for Production Number 7:

Please produce, or make available for review, all documents produced to other parties in this proceeding.

BNSF Response: Subject to and without waiving its general objections, BNSF will produce or make available for review all documents produced to other parties in this proceeding subject to the terms and conditions of the protective order entered in this proceeding.

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Respectfully submitted,



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February 1, 2010

CERTIFICATE OF SERVICE

I hereby certify that on January 21, 2010, I caused a copy of foregoing to be served (1) by hand delivery on the following parties of record in this case:

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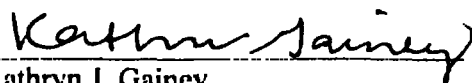
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